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In the Supreme Court of the United States

OCTOBER TERM, 1979

DEPARTMENT OF ENERGY AND
CHARLES W. DUNCAN, JR.,
SECRETARY OF ENERGY, PETITIONERS

v.

MOBIL OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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The Solicitor General, on behalf of Charles W. Duncan, Jr., Secretary of Energy, and the Department of Energy, petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C, *infra*, 18a-38a) is reported at 610 F.2d 796. The findings of fact and conclusions of law and the judgment of the district court (Apps. A and B, *infra*, 1a-14a, 15a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1979 (App. D, *infra*, 39a) and a petition for rehearing was denied on February 4, 1980 (App. E, *infra*, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

QUESTIONS PRESENTED

In 1974 the predecessors of the Department of Energy issued petroleum-refiner price-control regulations that limited the amount of price increases refiners may charge their customers of gasoline and virtually all other petroleum products. Several times thereafter, the agency repromulgated the same regulations after notice and opportunity for comment. These regulations are at the core of the statutory scheme to control fuel prices under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* (EPAA), and the crude-oil cost-allocation formula at issue in this case has been at the core of those regulations since they were first promulgated.

The questions presented by this case are whether the court of appeals erred in (i) striking down the crude-oil cost-allocation formula contained in the price-control regulations for failure to give notice and opportunity for comment under 5 U.S.C. 553(b) and failure to consider adequately the statutory objectives of the EPAA, and (ii) holding that the formula was not validly re-established by the subsequent repromulgations.

STATUTES INVOLVED

Pertinent portions of the Administrative Procedure Act, 5 U.S.C. 553, and the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, are set forth in Appendix F, *infra*, 41a-43a.

STATEMENT

1. Section 203 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, authorized the President to issue orders and regulations to stabilize the price of any product, including petroleum products. On August 19, 1973, pursuant to this authority, the President, acting through the Cost of Living Council, promulgated the predecessor of the petroleum price-control rules declared invalid by the Temporary Emergency Court of Appeals (TECA) in this case. 38 Fed. Reg. 22536 (1973); 6 C.F.R. 150.351, *et seq.* (1974).

These pricing rules regulated any "covered product," a term defined to include "a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911." 6 C.F.R. 150.352 (1974). The rules generally limited the maximum selling price of a "covered product" to the petroleum refiner's weighted average selling price of that end product on May 15, 1973, plus any increased crude oil costs (product costs) and certain overhead and marketing costs (non-product costs) attributable to that product. 6 C.F.R. 150.355 (1974).

The price regulations also prohibited any refiner from passing through more than 100% of any cost in-

creases incurred in purchases of crude oil after May 15, 1973, but, with one major exception, allowed the refiner to increase the prices of any of its end products as the refiner deemed appropriate in order to recapture the cost increases in crude oil. The single exception was the so-called "special products" rule. Under this rule, no "special product" (which then included gasoline, No. 2-D diesel fuel, and No. 2 heating oil) could bear more than its volumetric proportion of increases in crude oil costs. 6 C.F.R. 150.352, 150.356 (1974). Thus, if gasoline constituted one-half of the volume of all end products derived from crude oil sold by a refiner over a certain period, no more than one-half of the increased costs of the crude oil were allowed to be passed on to the refiner's gasoline customers. The rest could be recaptured in the sale of the other end products. 6 C.F.R. 150.356 (1974). To achieve this result, the regulations contained a formula for determining the volumetric proportion of increased product costs. This formula, known as the "V factor," was expressed as a fraction, the numerator of which was the total volume of a particular product sold in a specified time period and the denominator of which was the total volume of all "covered products" sold in the same period. 6 C.F.R. 150.356 (1974) (App. C, *infra*, 21a-22a).

2. The Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, was enacted on November 27, 1973. The Act directed the President "[n]ot later than fifteen days after November 27,

1973" to issue "a regulation providing for the mandatory allocation of * * * each refined petroleum product * * * and at prices specified in (or determined in a manner prescribed by) such regulation." The regulation was to be effective not later than 15 days after its promulgation. 15 U.S.C. 753(a). "[T]o the maximum extent practicable," the regulation was required to "provide for" nine objectives, including the "protection of public health," "maintenance of all public services," "maintenance of agricultural operations," "preservation of an economically sound and competitive petroleum industry," operation of refineries at "full capacity," "equitable distribution" of crude oil and refined petroleum products at "equitable prices" among users and regions, allocation for mineral extraction and exploration, "economic efficiency," and "minimization of economic distortion." 15 U.S.C. 753(b)(1). Significantly, the legislative history demonstrates that Congress, while recognizing that these objectives would in some instances conflict, intended the then-existing "price controls established * * * under authority of the Economic Stabilization Act" to "continue in effect unless and until required to be modified by the price regulation required to carry out the purposes of [the Emergency Petroleum Allocation Act]." H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 26 (1973).

Pursuant to this directive, the President, acting through the Administrator of the Federal Energy

Office,[1] published a proposed regulation on December 13, 1973 (38 Fed. Reg. 34414) and reissued the proposal with revisions on December 27, 1973 (39 Fed. Reg. 744 (1974)). These regulations, among other things, adopted Congress' suggestion and incorporated by reference the pricing rules issued under the Economic Stabilization Act. 38 Fed. Reg. 34434 (1973); 39 Fed. Reg. 1924 (1974); see 6 C.F.R. 150.356 (1974). The preambles to the proposed regulations stated that they "provided for" the nine statutory objectives "to the extent practicable and necessary to carry out the purposes of the Emergency Petroleum Allocation Act." 38 Fed. Reg. 34414 (1973); 39 Fed. Reg. 744-745 (1974). The final regulation, issued on January 14, 1974, after all interested persons had been given notice and an opportunity to comment, carried forward the pricing provisions described above. 39 Fed. Reg. 1924, 1952-1956 (Part 212).

[1] Upon enactment of the Emergency Petroleum Allocation Act and the issuance of Exec. Order No. 11748, 38 Fed. Reg. 33575 (1973), the Cost of Living Council delegated its authority over the petroleum industry to the new Federal Energy Office. Cost of Living Council Order No. 47, 39 Fed. Reg. 24 (1974). In 1974 Congress established the Federal Energy Administration. 15 U.S.C. 762. By Exec. Order No. 11790, 39 Fed. Reg. 23185 (1974), the Federal Energy Office was abolished and all authority vested in the President under the Emergency Petroleum Allocation Act was delegated to the Federal Energy Administration. On October 1, 1977, the Department of Energy succeeded to the interests of the Federal Energy Administration. 42 U.S.C. (Supp. I) 7151(a); Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977). The successive agencies responsible for the enforcement of the petroleum price regulations are hereinafter referred to as the "agency."

3. As had been true under the earlier regulations, the petroleum products affected by the new regulation were determined by reference to the term "covered products." As mentioned above (see page 3, *supra*), that term was defined in the old regulations to embrace virtually every petroleum product. The EPAA, however, authorized regulation only of "crude oil, residual fuel oil, and * * * refined petroleum product[s]" (15 U.S.C. 753(a)).[2] Because all authority to regulate the broader class of petroleum products was to expire with the Economic Stabilization Act on April 30, 1974, the agency amended the January 14 regulation on April 3, 1974, to limit the definition of "covered products" to "crude oil, residual fuel oil and refined petroleum products" and to exempt from the price-control regulations petroleum coke, petroleum wax, asphalt, road oil and refinery gas, which did not fall within the definition of covered products under the EPAA. 39 Fed. Reg. 12353-12354.

This amendment was promulgated without notice and opportunity for public comment. 5 U.S.C. 553(b) authorizes rule-making without opportunity for public notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." See

[2] "Refined petroleum product" means "gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." 15 U.S.C. 752(5).

also 5 U.S.C. 553(d). The April 3 amendment was accompanied by a statement explaining the need to conform the definition of "covered products" to the actual scope of the EPAA and concluding that it was impracticable to give notice and opportunity for comment because "the purpose of the[] amendment[] is to provide immediate guidance and information with respect to the mandatory petroleum price regulations and to permit the amendment[] to be implemented during the month of April * * *." 39 Fed. Reg. 12354 (1974).

Shortly thereafter, the agency realized that the April 3 amendment was incomplete because a corollary amendment to the cost-allocation formula, which is keyed to the term "covered product" but which is contained in a different part of the regulations, had not been made. As noted above (see page 4, *supra*), the "special products" rule allowed each special product to bear no more than its volumetric proportion of increased crude oil costs. This proportion was determined by dividing the particular special product's volume by the total volume for all "covered products" over a given time period. Under the old regulations, the phrase "covered products" comprehended all of the end products of a refinery. This was the scheme that the agency intended to continue under the EPAA regulations. Unfortunately, however, when the term "covered products" was narrowed on April 3 to conform it to the scope of the EPAA, the agency did not realize that this change would automatically reduce the denominator of the V factor and would thereby permit the reduced number of covered products to bear all of the increased crude oil costs. This in turn would allow a refiner to recoup all of its crude oil increases in the prices of covered products and, in essentially a double recovery, to recoup the same (or even more) costs in the prices of exempt products. Hence, special products would have borne more than a volumetric share of a crude oil cost increase.[3]

In order to correct this unintended result and to conform the regulations to the agency's original intent—*i.e.*, to carry forward the existing cost-allocation formula, including the "special products" rule—the January 14 regulation was again amended on April 30, 1974. This amendment simply provided that *all* crude oil end products, whether "covered" or not under the EPAA, would be counted in the denominator of the V factor, so that each special product would bear only its proportionate share of crude oil cost increases and all covered products as a group would bear no more than their proportionate share of increased costs. 39 Fed. Reg. 15139 (1974).

The April 30 amendment also was promulgated without prior notice and opportunity for comment. The preamble to the amendment explained that the

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[3] For example, if products not covered by the EPAA constituted 10% of the total sales volume of a refiner in a given period, the denominator of the V factor would be 10% less than under the regulation as originally adopted, but the numerator for special products would remain the same. The resulting fraction would be greater, thereby increasing the crude oil costs that could be passed through in the price of special products. App. G, *infra*, 44a-46a, illustrates the application of the January 14 cost-allocation formula, the April 30 cost-allocation formula, and the unintended formula created by the April 3 amendment as construed by TECA.

change was necessary to "insure that all of the increased cost of crude oil processed by a refiner is not allocated to covered products" and that "the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum price rules and regulations which apply to [refiners'] permissible prices in the month of May." The agency found that it would be "impracticable" to follow the "normal rulemaking procedure" and that "good cause exist[ed] for making these amendments effective in less than 30 days." 39 Fed. Reg. 15139 (1974). Neither the preamble to the April 3 nor the preamble to the April 30 amendment expressly referred to any of the nine statutory objectives set forth in 15 U.S.C. 753(b).

4. The agency published the "first proposed comprehensive revision" of the new regulations on September 10, 1974. 39 Fed. Reg. 32718. One major proposal was the possible elimination of the "special products" rule, which, as noted earlier, limited price increases for special products to their volumetric share of increases in crude oil costs. *Id.* at 32722-32723. Although the final regulation published December 5, 1974, retained the "special products" rule (39 Fed. Reg. 42368), numerous changes were made in 10 C.F.R. 212.83 (1975), the heart of the refiner pricing regulation.[4] In making these changes, and in repromulgating 10 C.F.R. 212.83 (1975), the agency indisputably provided the

[4] Some of the changes reflected in the regulation published December 5, 1974, had been adopted, pursuant to the same September 10 notice, on November 1, 1974. 39 Fed. Reg. 39259 (1974).

notice-and-comment opportunity specified in 5 U.S.C. 553.[5] Thereafter, the agency amended and repromulgated the cost-allocation formula of Section 212.83 several times—in each case with notice to interested parties and an opportunity for them to comment.[6]

5. On July 26, 1976, respondent Mobil Oil Corporation commenced this action in the United States District Court for the Eastern District of Texas to set aside the amended regulation issued on April 30, 1974. On January 31, 1979, the district court invalidated the amendment because (i) the agency lacked statutory

[5] In fact, respondent filed comments in response to the notice, suggesting an amendment to the product cost-allocation formula.

[6] See *e.g.*, notice of proposed rulemaking, 40 Fed. Reg. 3467 (1975), amended Feb. 28, 1975, 40 Fed. Reg. 10445; notice of proposed rulemaking, 41 Fed. Reg. 1680 (1976), amended Feb. 1, 1976, 41 Fed. Reg. 5111; notice of proposed rulemaking, 41 Fed. Reg. 31863 (1976), amended Jan. 19, 1977, 42 Fed. Reg. 5023.

Moreover, since February 1, 1976, the agency has decontrolled and thereby exempted nearly all petroleum products pursuant to the Energy Policy and Conservation Act, 15 U.S.C. 760a. In each case, the agency proposed or assumed that the volume of such exempted products would continue to be included in the denominator of the V factor. As amended on April 30, 1974, the denominator included the volume of all "covered products" and products "other than covered products," *i.e.*, decontrolled products. See 41 Fed. Reg. 7122 (1976), 41 Fed. Reg. 13896 (1976) (residual fuel oil); 41 Fed. Reg. 17512 (1976), 41 Fed. Reg. 24516 (1976) (middle distillates); 41 Fed. Reg. 24188 (1976), 41 Fed. Reg. 30096 (1976) (naphthas gas oils and other products); 41 Fed. Reg. 34784 (1976), 41 Fed. Reg. 40452 (1976) (naphtha jet fuel); 43 Fed. Reg. 27974 (1978), 44 Fed. Reg. 7070 (1979) (aviation gasoline and aviation jet fuel).

"good cause" for not publishing a general notice of the proposed amendment and giving interested persons an opportunity to comment,[7] (ii) the agency violated 15 U.S.C. 753(b) by failing to weigh each of the nine statutory objectives in promulgating the amendment, and (iii) the amendment did not satisfy the statutory requirement of "dollar-for-dollar passthrough" [8] of all increased product costs because, due to market conditions for some exempt products, Mobil had been unable to pass through all of its costs.[9]

On appeal, the Temporary Emergency Court of Appeals affirmed the first two holdings of the district court without reaching the "dollar-for-dollar pass-

[7] The agency argued that the imminent expiration of its authority to regulate certain petroleum products justified the issuance of the April 3 amendment without notice and comment and that the agency's oversight in appreciating that amendment's unintended effect on the cost-allocation formula justified the issuance of the corrective amendment on April 30 without notice and comment. The district court rejected these arguments, stating that "the agency [is not] free to delay formulation of such an amendment until the last moment and then invoke the 'good cause' exceptions" (App. A, *infra*, at 12a).

[8] On April 30, 1974, 15 U.S.C. (1970 ed., Supp. IV) 753 (b) (2) (A) required that the regulation "provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level."

[9] In addition, the court held that even if the regulation were valid, the agency erred in denying Mobil's applications for exception relief in light of the "serious hardship" and "gross inequity" imposed on Mobil by the regulation (App. A, *infra*, 13a-14a). The court of appeals reserved this issued in light of its holding that the regulation is invalid (App. C, *infra*, 35a).

through" question. The court of appeals held that the April 30 amendment was a substantive change in the regulations and thus subject to the notice-and-comment requirement of 5 U.S.C. 553. The court rejected the agency's argument that statutory "good cause" to dispense with notice and comment existed in light of (i) the discovery of the inadvertent error introduced into the cost-allocation formula by the April 3 redefinition of "covered products" and (ii) the need to give immediate guidance to the refining industry, which had to apply the formula in the month of May 1974. Although the court recognized that the expiration of the Economic Stabilization Act required a redefinition of "covered products," it concluded that the expiration date had not been so unexpected that the agency, had it acted promptly, could not have complied with Section 553 (App. C, *infra*, 32a). The court also held (*id.* at 37a n.11) that repromulgation of 10 C.F.R. 212.83 proposed in September 1974 and issued in December 1974 after ample notice and opportunity for comment did not cure the earlier defect or reestablish the amended cost-allocation formula. The repromulgation, said the court, had not concerned product-cost pass throughs at all.[10]

[10] Neither the court of appeals nor the district court found that the agency had actually learned of the problem accidentally introduced into the cost-allocation formula in time to publish notice and to effectuate the amendment by April 30, 1974. Nor did either court find that the agency had acted unreasonably, in light of its other pressing responsibilities during that period, in not learning of the problem in time to publish advance notice that would have permitted effectuation of the amendment by April 30.

Finally, concerning the nine statutory objectives, the court of appeals remarked that "at no time prior to promulgating the April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in [15 U.S.C.] § 753(b)(1)" (App. C, *infra*, 28a). Therefore, the court held that "the agency neglected to fulfill its statutory command" and its action "was beyond its statutory authority" (*ibid.*).

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is incorrect. Unless overturned by this Court, the court of appeals error may well cost American consumers of petroleum products and enrich respondent and other oil companies by at least $17 billion.[11]

A. Contrary to TECA's conclusion, the agency was not required to give notice and opportunity for comment before issuing the April 30 amendment to the cost-allocation formula. When an agency issues a rule after notice and comment and then discovers that the rule inadvertently expresses a policy that the agency had not intended to adopt, the agency may issue a conforming amendment without commencing new rule-making procedures or inviting new comment, so long as the amendment reasonably falls within the subject on which comment was originally invited and the amendment is promulgated before any person places reasonable reliance on the original rule. Such an

[11] See pages 26-28, *infra*.

amendment is in essence nothing more than a continuation of the first rule-making proceeding. Because the public has already had an opportunity to comment on the subject of the amendment, a new round of comment is unnecessary. The Administrative Procedure Act does not mandate pointless gestures.[12]

This Court has reached a similar conclusion in considering the analogous problem of inadvertent omissions from certificates of public convenience and necessity in Interstate Commerce Commission proceedings. In *American Trucking Ass'ns* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), the ICC reopened a proceeding, despite a statutory provision that made issuance of a certificate of public convenience and necessity "the final step in the administrative process," in order to insert a substantive provision that had been unintentionally omitted from the original certificate. Over the objection that the ICC lacked power to correct its error at that stage without commencing new proceedings, the Court remarked that the

[12] We do not contend that such amendments may be made after a relatively long delay or after reliance is reasonably placed on the rule as originally promulgated. At some point, the agency must be deemed to have intended to adopt its actual statement of policy, and those who have relied thereon ought to have an opportunity to comment on any revisions. We do submit, however, that within reasonable limits an agency necessarily must have the power to correct its misstatements expeditiously without having to comply with procedural requirements not designed to apply in such circumstances. In the present case there is no claim that anyone relied on the erroneous and unintended formula created by operation of the April 3 amendment during the period from April 3 to April 30, 1974.

Commission acted reasonably in finding that the omission was inadvertent and held that the finality provision did not bar a corrective amendment to conform the final order to the Commission's intended decision. *Id.* at 143, 145-146. Indeed, TECA itself has found that after issuing the January 14, 1974, petroleum regulations—the very regulations in question here—the agency was entitled five weeks later to reverse even a deliberate policy decision expressed in the regulations, without notice and comment, because the basic rule-making proceeding had not yet ended. *California* v. *Simon*, 504 F.2d 430, 433-439 (TECA), cert. denied, 419 U.S. 1021 (1974). A fortiori, where, as here, a modification became necessary because the original regulation stated a rule the agency *did not intend to adopt*, the amendment should be deemed a continuation of the original rule-making proceeding.

In the present case, the public had already been given ample opportunity to comment on the agency's proposal to carry forward the "special products" and other pricing rules into the new EPAA regulations without change (except, obviously, for changes necessitated by differences in the coverage of the EPAA). As originally issued on January 14, however, the regulation did not accomplish this goal because the agency, under the compulsion of a short statutorily-imposed time deadline, failed to consider the difference in scope between the old definition of "covered products" and the coverage of the EPAA—a difference that would become crucial upon the impending expiration of the Economic Stabilization Act on April 30, 1974. The

agency promptly took this difference into account in the April 3 and 30 corrective amendments. The amendments clearly fell within the subject to which public comment had already been invited in December 1973 (see page 6, *supra*). Moreover, neither Mobil nor any other refiner of petroleum products has ever claimed reliance on the unintended cost-allocation formula created by the operation of 10 C.F.R. 212.31 and 212.83 during the short period of time from April 3 to April 30, 1974. In these circumstances, the amendments were an integral part of the original rule-making proceeding, and a second, duplicative notice and opportunity for comment was not required.[13]

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[13] Although the agency did not expressly argue below that the April 3 and April 30 amendments were a continuation of the rule-making proceeding commenced on December 13, 1973, the agency did advance arguments directly supporting that analysis. The agency argued that there was no need to give a new notice and comment (Br. 28, 31), that Congress by enacting the EPAA had already approved the old cost-allocation formula (Br. 9), that the statutory objectives had already been taken into account in promulgating the January 14 regulation (Petition for Rehearing 7), that the purpose of the April 30 amendment was to carry forward the volumetric apportionment formula promulgated in January (Br. 27, 30), and that the April 30 amendment simply restated or interpreted the agency's intent in the January 14 regulation (Br. 31-34). The agency also argued (Br. 29), citing *California* v. *Simon*, *supra*, that it was "entitled to reasonable leeway in the gale of Congressional deadlines while it assumed charge of the regulatory structure." As noted in the text, *Simon* specifically held that the January 14 regulation contemplated follow-up clarifying amendments and that a subsequent amendment was part of the same rule-making proceeding so that the agency did not have to provide new notice and oppor-

In any event, 5 U.S.C. 553(b) does not require notice and comment when the "agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Here, a number of factors supported the agency's finding that notice and comment were "impracticable, unnecessary, or contrary to the public interest": (i) the public had been invited in December 1973 to comment on the "special products" rule, the cost-allocation formula, and their application under the EPAA, (ii) the January 14, 1974, regulation did not take into account the slightly narrower scope of the EPAA and its indirect effect on the formula, (iii) such considerations were well within the subject of the earlier opportunity for public comment, (iv) the April 3 and April 30 amendments did no more than carry forward the old formula with such adjustments as were necessary to conform to the narrower scope of the EPAA, (v) the April 30 amend-

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tunity for comment. ("Br." refers to the agency's brief in the court of appeals.)

Alternatively, the April 3 amendment (i) reduced the scope of the regulations and (ii) altered the cost-allocation formula, albeit inadvertently. If the public was entitled to notice and opportunity for comment on the April 30 amendment to the formula, then presumably the public was also entitled to notice and opportunity for comment on the April 3 amendment to the formula. If both amendments are invalid, then the January 14 formula, which required all end products to be included in the denominator of the V factor, was not superseded at all. Conversely, if the April 3 amendment is valid, then the April 30 amendment must also be valid. Cf. *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (TECA 1977) (April 3 amendment validly issued without notice and comment). See Br. 26-30.

ment was made promptly and before any claim of reliance on the unintended formula, (vi) immediate and authoritative resolution of the problem was necessary to give guidance to refiners and to avoid implementing a policy that the agency believed—and neither court below disputed—was contrary to the public interest, (vii) the preamble to the basic regulations amended on April 3 and April 30 invited the public to suggest improvements to the regulations, including "unanticipated problems" (39 Fed. Reg. 1924 (1974)), and the agency could properly assume that any objection to the April 30 amendment would be brought to its attention, and (viii) the regulations provided an exception for refiners who could demonstrate any inequitable hardship resulting from the formula (10 C.F.R. 205.50 *et seq.* (1975).

Rather than reweighing these factors *de novo*, the courts below should have limited their scope of review to whether a reasonable basis existed for the agency's "good cause" determination. If the administrative record was inadequate to make this finding, the proper remedy was a remand to the agency for clarification of the basis for its "good cause" determination, not to invalidate the regulation. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). This standard of judicial review of administrative action is particularly appropriate in dealing with "good cause" determinations, because Congress directed in 5 U.S.C. 553(b)(B) that the agency, not the court, make the determination of

"good cause" and because the agency, not the court, is in the best position to judge the need for dispensing with notice and comment in the context of a particular regulatory program. As this case well illustrates, any other rule would allow the imposition of disproportionately severe penalties on an agency (and the public) because a court—long afterwards, and with the luxuries of hindsight and time for extended consideration—simply disagrees with the agency's "good cause" determination.

The decision below is incorrect for yet another reason. The notice-and-comment requirement of 5 U.S.C. 553 does not apply to interpretive regulations such as the April 30 amendment. See 5 U.S.C. 553(b)(A). The April 30 amendment was interpretive because it construed the term "covered products" in the denominator of the formula set forth in 10 C.F.R. 212.83 (1975) and confirmed that it retained its original meaning (for purposes of cost allocation), *i.e.*, *all* petroleum products, in spite of the April 3 change in the meaning of "covered products" in 10 C.F.R. 212.31 (1975) (for purposes of stating the scope of products regulated under the EPAA rules). In a precisely analogous case under a different statute, the Second Circuit held that such corrective amendments are interpretive regulations and may be issued without notice and comment. *Mitchell* v. *Edward S. Wagner Co.*, 217 F.2d 303, 304 (2d Cir. 1954), aff'g *Durkin* v. *Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D.N.Y. 1953).[14] See also *British Caledonian Airways, Ltd.* v.

[14] In *Mitchell*, the court of appeals in an earlier appeal had overturned a finding that the employer had violated the Fair

CAB, 584 F. 2d 982, 990 (D.C. Cir. 1978); *Marshall* v. *W & W Steel Co.*, 604 F.2d 1322 (10th Cir. 1979).[15]

Labor Standards Act, 29 U.S.C. 201 *et seq.*, because, although the Act was sufficiently broad to cover the employees at issue, the agency's regulations appeared not to cover them. While the case was pending on remand, the agency amended its regulations without notice and comment to specify that the definitional provisions of the regulations did cover the employees. The employer contended that the new regulation was invalid for lack of advance notice and comment. The district court disagreed, holding that notice and comment were not required because the rule was interpretive and because "good cause" existed within the meaning of 5 U.S.C. 553. 115 F. Supp. 118. The regulation was interpretive, said the court, because the agency had always construed and enforced its regulations in conformity with the amendment. *Id.* at 121. Moreover, "good cause" existed because of an "immediate" need to safeguard wage standards, to eliminate uneven application of the regulations to employees and to provide for adequate enforcement of restrictions imposed under the Act. *Id.* at 121-122. The Second Circuit affirmed on both grounds. 217 F.2d 303. Although *Mitchell* involved a different regulatory statute than is involved here, the Second Circuit reached a result precisely opposite from that reached in the present case concerning the meaning of 5 U.S.C. 553.

[15] TECA viewed the agency's interpretive rule argument as inconsistent with the agency's "good cause" determination (App. C, *infra*, 33a) and with the fact that the agency provided for notice and comment for subsequent amendments to the refiner cost-allocation formula (*id.* at 35a n.9). There is no inconsistency, however. In cases where there is some uncertainty whether a rule is legislative or interpretive, an agency may properly make a "good cause" determination in order to avoid future challenges even though it believes the rule to be interpretive. Nor is there any inconsistency in providing notice and comment prior to making a *substantive* change in a regulation that has previously been construed through an interpretive rule. Moreover, 5 U.S.C. 553(b) does not require an agency, at the time of promulgating a rule, to publish a finding that the rule is interpretive.

B. The court of appeals also erred in holding that the April 30 amendment was invalid for lack of "consideration" of the nine statutory objectives. First, the nine statutory objectives were considered by the agency in issuing the original rule on January 14, 1974. 38 Fed. Reg. 34414 (1973); 39 Fed. Reg. 744-745 (1974). For the reasons stated above (see pages 16-17, *supra*), the April 3 and 30 conforming amendments were an integral part of the same rule-making proceedings as the January 14 rule. Inasmuch as the statutory objectives were considered in deciding to carry forward the earlier pricing scheme, modified only as necessary to conform to the coverage of the EPAA, it was unnecessary to reconsider the nine objectives in detail merely to amend the regulation to correspond to that earlier decision.

In any event, even if the January 14, April 3, and April 30 rules are viewed as separate proceedings, the courts below should have limited their review to whether the agency unreasonably failed to take into account any "relevant factors" or "committed a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S. at 416; *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-803 (1978).[16] No clear error of judgment is present in this case, because the regulation is plainly a ra-

[16] Under Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, the standard of judicial review of EPAA regulations is the same as APA review under 5 U.S.C. 706.

tional accommodation of the statutory goals.[17] Neither the district court nor the court of appeals disagreed with this conclusion.

The court of appeals erroneously assumed that the agency must give detailed consideration to *each* of the nine statutory concepts in *every* action it takes under the EPAA. Section 753(b), however, only requires that EPAA regulations as a whole "provide for" the nine objectives. It does not require the agency in issuing rules to make findings concerning any of the statutory goals. Nor does the statute require the agency to consider every possible way by which the nine expansive concepts are remotely implicated by every action it takes. Instead, these nine concepts are

[17] Because Congress approved the adoption by the agency of the Cost of Living Council pricing regulations, Congress itself determined that those rules were a satisfactory accommodation of the conflicting statutory objectives (except to the extent modification might be required to conform the rules to the slightly narrower scope of the EPAA). Moreover, Congress ratified the agency's application of the statutory objectives in the April 30 amendment by enacting the Energy Policy and Conservation Act (Pub. L. No. 94-163, 89 Stat. 871) on December 22, 1975. There Congress not only extended the agency's price control authority, thereby implicitly ratifying the regulations then in place, but also enacted Section 4(b)(2)(D) of the EPAA (15 U.S.C. 753(b)(2)(D), which required that the cost-allocation regulations "shall not permit more than a direct proportionate distribution (by volume)" to certain products "of any increased costs of crude oil." The Conference Report described the then-current refiner cost-allocation formula and noted that the new section "elevates the regulatory scheme to statutory status." S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 198 (1975). Thus, Congress was aware of and approved the precise regulation at issue here.

essentially hortatory. See H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 2688 (1973). For purposes of judicial review of EPAA regulations, their only role is to assist by the diffuse light they shed in illuminating the "relevant factors." Thus, a reviewing court may inquire only whether the administrative record shows that any statutory consideration reasonably implicated by the proposed action was arbitrarily given no consideration.[18] Here, the courts below erred in failing to identify a single relevant consideration that the agency arbitrarily failed to take into account. Moreover, if the administrative record left any doubt on that score, the proper disposition would have been a remand to the agency for clarification of the issues it considered relevant.[19]

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[18] Even where a statute explicitly requires an agency to "consider" certain issues before acting, the agency is only required to consider such of those issues as are reasonably implicated by its intended action or substantial issues brought to its attention. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978) (NEPA does not require consideration of alternatives not reasonably implicated by proposed course of action unless they are brought to the agency's attention). If there is no reasonable prospect that an issue would influence the ultimate decision, it is not unreasonable not to pursue it. Mobil contends that it would have brought certain issues to the agency's attention had advance notice been published and that those comments might have affected the agency's decision. Although an agency is not free to disregard substantial comments made during a notice-and-comment period, that argument does not arise in this case if our submission that notice and comment were unnecessary is correct.

[19] The courts below remarked (App. A, *infra*, 4a-5a; App. C, *infra*, 28a) that the agency conceded in discovery that it had not given any consideration to the statutory goals. The agency stated in answer to interrogatories that in promulgating the April 30 amendment it had not "considered" or "investigated" the impact of the amendment on the "supply of refined petroleum products in the United States" (which itself is not an explicit statutory factor) (R. 96, 97). These and other ambiguous interrogatory answers (R. 36, 40, 56) were construed by TECA and the district court as admissions that no consideration whatever was given to the *statutory* objectives.

The interrogatory answers do bear the construction that the agency gave no detailed consideration or "investigation" to the matters mentioned in the interrogatories. At no time, however, did the agency state that it promulgated the April 3 or April 30 amendments without regard to whether any *statutory* objectives were reasonably implicated by its action. In fact, the agency explained in the April 30 preamble (39 Fed. Reg. 15139) that the purpose of the amendment was to "insure that all of the increased cost of crude oil processed by a refiner is not allocated to covered products," *i.e.*, that the pricing rules would continue to maintain "equitable prices" (which is one of the statutory factors). See 15 U.S.C. 753 (b) (1) (F). We are lodging with the Clerk of the Court a copy of two volumes of the joint Appendix in the court of appeals which contain the interrogatory answers.

C. Finally, even assuming that the April 30 amendment were invalidly issued, the court of appeals erred in holding that the agency's subsequent repromulgation of the pricing regulations in December 1974 did not validly revive the cost-allocation formula (App. C, *infra*, 37a n.11). The court's conclusion was based on a plain factual error—TECA believed, incorrectly, that the amendment proposed on September 6, 1974, and issued on December 5, 1974, concerned only a cost-allocation formula for non-product cost increases (*ibid.*).[20] In fact, the public was invited to comment

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[20] This factual error was pointed out to TECA in the agency's Petition for Rehearing and Suggestion for Rehearing En Banc (at pages 2, 10).

(and Mobil did so) on whether the *product* cost-allocation formula should be changed. 39 Fed. Reg. 32725-32727 (1974). Thereafter, the entire product cost-allocation formula was repromulgated and was comprehensively revised, although that part of the denominator including the volume of sales of exempt products was not changed (see page 10, *supra*). This rule, as well as the numerous other repromulgations of the cost-allocation formula (see note 6, *supra*), unquestionably would have been valid upon final publication if the April 30 amendment had never been made. *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Hence, the court of appeals' conclusion that any defect in the April 30 amendment remained fatal through at least February 1, 1976, is wholly insupportable.

2. The court of appeals' decision imposes a severe burden on federal regulation of the prices of petroleum products and exacts a severe penalty from American consumers of those products. The immediate result of the decision is to increase substantially the maximum lawful selling price of all regulated products from April 30, 1974, through at least February 1, 1976.[21] Refiners have already begun to recalculate

[21] In our view the decision below does not directly question the validity of the agency's regulations issued after February 1, 1976, which prohibit, as did the April 30 amendment, any inclusion in the prices of covered products of costs attributable to exempt products (See App. C, *infra*, 37a n.11). Petroleum refiners, however, have construed the decision as holding that increased costs attributable to exempt products may be assigned to covered products from April 30, 1974, *to date* (so long as certain products receive no more than a

their maximum lawful selling prices of regulated products for that period to include crude oil costs previously not attributed to regulated products.[22]

This recalculation, if allowed to occur, will have two significant impacts on the ongoing enforcement of federal pricing regulations. First, under 10 C.F.R. 212.83(e), refiners may carry over or "bank" any portion of their lawful selling prices not recovered in a given period and may use such "banked" credits to increase prices in any later period. The agency estimates that refiners will claim a minimum of $17 to $18 billion in additional credits for the period April 30, 1974, through February 1, 1976, based solely on the decision below. Refiners may attempt to recover these vast sums in imminent price increases (over and above otherwise lawful price increases) in the only remaining covered product eligible to absorb accrued costs—motor gasoline.[23] Because decontrol of

volumetric apportionment in accordance with 15 U.S.C. 753(b)(2)(D)). Moreover, some refiners have already filed claims for credits with the agency without offsetting these recalculated credits by the amounts of increased costs already recovered in the sales of exempt products. If the court of appeals' decision is not overturned and the refiners' interpretation of that decision ultimately prevails, the total increase in oil prices may exceed $50 billion.

[22] The recalculation is based on the differences in the cost-allocation formulas illustrated in Appendix G, *infra*, 44a-46a.

[23] As indicated above (see page 11, note 6, *supra*), since the adoption of the April 30, 1974, amendment, all petroleum products except gasoline and propane have been deregulated. Because propane is one of the products specified by Congress to receive no more than a proportionate share, by volume, of increased crude oil costs (15 U.S.C. 753(b)(2)(D)), gasoline

gasoline itself is currently scheduled for September 30, 1981 (see 15 U.S.C. 760g), refiners will have a substantial incentive to recover the billions of dollars in accrued costs in the prices of gasoline before that time—thus frustrating federal controls on gasoline prices and weakening the nation's attempts to combat inflation. Second, the agency has brought hundreds of pending actions to recover refiner overcharges in excess of maximum lawful prices computed under the cost-allocation formula held invalid by TECA. The effect of the decision below is to raise retroactively the maximum lawful price and thereby reduce, if not eliminate, the amount of the overcharges.

Apart from these immediate adverse consequences to the Department of Energy's enforcement program and to the public, the court of appeals' decision effectively discourages an agency from invoking the "good cause" exception to notice and comment authorized in 5 U.S.C. 553(b). The striking of a regulation that is rational and consistent with its underlying statute is especially troublesome for those agencies that, like DOE, do not have the benefit of a statutory review-preclusion clause requiring challenges to regulations to be made promptly after promulgation. Compare 33 U.S.C. 1369(b) (Clean Water Act); 42 U.S.C. (Supp. I) 7607(b)(1), (2) (Clean Air Act). In the instant case, for example, the only challenge to the petroleum cost-allocation regulation came more than

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alone (which is no longer a "special product") would bear an additional amount of accrued costs.

three years after its promulgation, and it took more than two years before the district court ruled the regulation invalid. By then the challenged regulation had been repromulgated a number of times (see note 6, *supra*) and, in reliance on its validity, the agency had decontrolled all but a few petroleum products (*ibid.*). The specter of having to begin the regulatory process anew after so long a period of time will deter agencies from taking prompt action under Section 553(b) in circumstances where the public interest overrides the need for notice and comment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Civil Action No. B-76-273-CA

[Filed January 31, 1979]

MOBIL OIL CORPORATION, PLAINTIFF

v.

THE DEPARTMENT OF ENERGY and
DR. JAMES R. SCHLESINGER,
Secretary of Energy, DEFENDANTS

FINDINGS OF FACT

Having considered the pleadings herein, the argument of counsel, plaintiff's and defendants' cross motions for summary judgment, the memoranda in support thereof and exhibits attached thereto and having determined that there are no genuine issues of material fact, the Court now finds as follows:

1. Plaintiff Mobil Oil Corporation ("Mobil"), a New York corporation, with its principal place of business in New York, New York, is engaged in the production and sale, including exploration for, extraction, refining and marketing of petroleum and petroleum products in the United States and certain foreign countries. Defendants' Answer To Plaintiff's Amended Complaint For Declaratory Relief, ¶¶ 3, 8.

2. Defendant Department of Energy ("DOE") is an executive department of the United States, organized and existing under the provisions of the De-

partment of Energy Organization Act, Pub. L. 95-91, August 4, 1977, 91 Stat. 565, 42 U.S.C.A. §§ 7101, *et seq.*, and Executive Order No. 12009 (42 F.R. 46267, September 15, 1977). The DOE is the successor to, *inter alia*, the Federal Energy Administration ("FEA"), a former agency of the United States, organized under the provisions of the Federal Energy Administration Act of 1974 ("FEAA"), Pub. L. 93-275, 88 Stat. 96, 15 U.S.C.A. §§ 761, *et seq.*, and Executive Order No. 11790 (June 25, 1974). The FEA was the successor to the Federal Energy Office ("FEO"), which was established by Executive Order No. 11748 on December 4, 1973 (38 Fed. Reg. 33575). Defendant James R. Schlesinger is Secretary of the Department of Energy and in that capacity has been delegated, *inter alia*, the powers and duties conferred upon the President by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. 93-159, 87 Stat. 628, 15 U.S.C.A. §§ 751, *et seq.*, as well as the powers and duties conferred upon the FEA or its Administrator by the FEAA.

3. At four of its refineries in the United States, located at Beaumont, Texas, Paulsboro, New Jersey, Torrance, California and Joliet, Illinois, Mobil has installed certain highly specialized plant facilities known as "coker units" to maximize production of gasoline and distillates at those refineries. The coker units further refine the residue from the primary refining process in order to achieve the maximum yield of gasoline and distillates from the crude oil used for refining. These units increase the yield of

gasoline and distillates by as much as 20 percent. Coker units represent approximately 13.5 percent of Mobil's total crude refining capacity. Defendants' Answer To Plaintiff's Amended Complaint For Declaratory Relief, ¶ 9.

4. The solid residue remaining after secondary refining by the unit is the by-product, petroleum coke. As a result of its installation of coker units, Mobil is the largest domestic producer of the by-product petroleum coke. Mobil's production of coke was nearly two million tons (ten million barrels) in both calendar 1974 and 1975. *Id.*, ¶ 10.

5. Petroleum coke produced at the refinery level may be classified as metallurgical grade coke or fuel grade coke. Metallurgical grade coke is low in sulphur and metals, while fuel grade coke, the more common variety, contains larger quantities of sulphur and/or metals. *Id.*, ¶ 11.

6. Metallurgical grade petroleum coke is used in the aluminum industry in processing operations. Fuel grade petroleum coke, representing the majority of Mobil's coke production, historically has been mixed with coal and burned by electric utilities as fuel. *Id.*, ¶ 12.

7. On January 15, 1974, the FEO, a predecessor of the Department of Energy, promulgated a regulation which permitted refiners to allocate increased costs of acquiring crude oil in whatever manner they chose among any products they produced subject to special limitations for gasoline and No. 2 oil. 10 C.F.R. § 212.83, 39 Fed. Reg. 1952 (Jan. 15, 1974).

8. On April 3, 1974, the FEO specifically exempted from the FEO price control regulations certain petroleum by-products, including petroleum coke, which had previously been subject to price regulation under the authority of the Economic Stabilization Act ("ESA"). 39 Fed. Reg. 12353 (April 5, 1974).

9. On April 30, 1974, the FEO amended § 212.83 (c) (2) to require that a percentage of increased crude oil costs equal to the ratio of exempt products sales to total product sales be allocated to exempt products. 39 Fed. Reg. 15139 (May 1, 1974).

10. In amending § 212.83 (c) (2), the FEO did not publish a general notice of proposed rulemaking in the Federal Register and did not give interested parties an opportunity to participate in the rulemaking process. Defendants' Answer To Plaintiff's Amended Complaint For Declaratory Relief, ¶ 23.

11. In amending § 212.83 (c) (2), the FEO did not consider the volume of petroleum coke produced in and imported into the United States or the supply of and demand for energy sources which were alternatives to petroleum coke. Defendant FEA's Answers To Plaintiff's First Interrogatories, Answer to Interrogatory No. 1.

12. In amending § 212.83 (c) (2), the FEO did not consider the impact of the amendment on the price of, supply of or demand for petroleum coke. *Id.*, Answer To Interrogatory No. 3.

13. In amending § 212.83 (c) (2), the FEO did not consider how the amendment would affect the recovery of increased crude oil costs in sales of petroleum coke of other by-products. Defendant FEA's Supplemental Answers To Plaintiff's First Interrogatories, Answer To Interrogatory No. 4 (a).

14. In amending § 212.83 (c) (2), the FEO did not consider generally accepted accounting standards for the treatment of industrial by-product costs before it adopted the volumetric method for the treatment of such costs. Defendant FEA's Answers To Plaintiff's Second Set of Interrogatories, Answer To Interrogatory No. 2 (a).

15. In amending § 212.83 (c) (2), the FEO did not consider or investigate the impact of the amendment on the supply of refined petroleum products in the United States, the ability of refiners to increase the supply of refined petroleum products by the use of "coker units." *Id.* Answer To Interrogatory No. 3 (b).

16. The market for fuel grade petroleum coke has been diminishing in recent years because its sulphur and metal content may not satisfy environmental standards and it can easily be replaced by coal. Affidavit of Richard J. Flanary, ¶¶ 9, 10.

17. The availability of coal as an alternative energy source in the markets where petroleum coke is used means that the market price is controlled by the expense of the alternative source, rather than by the expense of petroleum based sources of energy, and has limited Mobil's ability to increase the prices it charges for coke. *Id.*, ¶ 9.

18. Because of the market conditions and the amendment of § 212.83 (c) (2), Mobil has been unable

to recover all of the increased crude oil costs which it has been required to allocate to petroleum coke (that percentage of its increased crude oil costs which the volume of its petroleum coke sales bears to the volume of its total sales of petroleum products). In 1974, to have completely recovered its cost of crude oil allocated to sales of coke, Mobil would have had to sell coke at three times the price at which it was sold. *Id.*, ¶ 9.

19. In 1974 and 1975, Mobil was unable to recover $39.6 million and $35.8 million respectively, of its increased crude oil costs allocable to coke under the FEO price regulation formula. Defendants' Answer, ¶ 17.

20. On June 5, 1974, Mobil filed a Request for Exception from the operation of § 212.83(c)(2), as amended, requesting that it be permitted to allocate all increased crude oil costs to the prices of covered products instead of apportioning those costs between covered and exempt products such as petroleum coke.

21. Mobil's request sought relief on the basis that the amendment, as applied to it, caused "serious hardship" and "gross inequity," the two criteria used by the agency to evaluate requests for such relief. 10 C.F.R. § 205.55 (b)(2) (1977). In addition, Mobil contended that the volumetric apportionment amendment adversely affected national energy objectives and was otherwise inconsistent with the EPAA.

22. The agency denied Mobil's Request for Exception on December 2, 1974. *Mobil Oil Corporation*, 1 FEA (Transfer Binder) ¶ 20,725. The stated

grounds for the denial were that (1) the substantial amounts of crude oil cost increases which Mobil estimated it would be forced to absorb as a result of the amendment did not constitute serious hardship because Mobil did not allege that its operations would be substantialy impaired, (2) the percentage of Mobil's refining capacity represented by coker units, though substantially greater than the industry average, did not constitute grounds for finding that the amendment's impact on Mobil would be grossly inequitable, and (3) the "significant" policy issues raised by Mobil concerning the rule's impact on national energy objectives could not be considered in an exception proceeding as grounds for relief. *Id.* at 20,901-02.

23. Mobil filed an appeal from the denial of its application for an exception on January 21, 1975. FEA denied that appeal on June 6, 1975. *Mobil Oil Corporation*, 2 FEA (Transfer Binder) ¶ 80,603.

24. On August 4, 1975, FEA granted to Getty Oil Company ("Getty") an exception from the operation of the price regulation, 10 C.F.R. § 212.83 (c)(2), by permitting Getty to regard all exempt petroleum products which it sold for ultimate consumption in the United States as "general refinery products," as defined in 10 C.F.R. § 212.31. *Getty Oil Company*, 2 FEA (Transfer Binder) ¶ 83,231 (hereinafter "*Getty*").

25. In *Getty*, the FEA found that that firm's unrecovered costs of crude oil allocable to exempt products under the price regulation were $2,705,000. The

FEA determined that these losses, although not considered by the FEA to work a serious hardship, were such that Getty could succeed in recovering all its increased costs of crude oil only by discontinuing secondary refining and thereby eliminating the production of coke. However, that would also reduce Getty's production of covered products and the FEA found that such a disincentive to production of covered products was contrary to national energy policy and the objectives of the Emergency Petroleum Allocation Act and resulted in a gross inequity warranting exception relief. *Id.*

26. Thereafter, on December 11, 1975, Mobil filed a further Request for Exception from the operation of 10 C.F.R. § 212.83(c)(2) as it affected exempt products such as coke. Mobil requested precisely the same relief as that granted to Getty, namely that exempt products, such as coke, be considered "general refinery products" for purposes of the price regulation. In that submission, Mobil asserted that its losses were seventeen times greater than those of Getty with an impact of its worldwide consolidated net income nearly five times that on Getty's, and Mobil submitted data to support those assertions. Based on that data, Mobil claimed that the amendment operated to cause Mobil a greater disincentive to secondary refining and production of coke than that which the FEA had found to result in gross inequity in *Getty*.

27. On January 23, 1976, the FEA denied Mobil's request for exception. *Mobil Oil Corporation*, 3 FEA (Transfer Binder) ¶ 83,083. The FEA concluded

that Mobil did not have the same disincentive to produce coke as did Getty because Mobil could neither forego the significant revenues from the production and sales of coke, nor could it fully recover the increased costs of crude oil presently allocated to coke under the price regulations because of Mobil's sizeable bank of unrecovered costs allocated to covered products. *Id.*

28. On March 1, 1976, Mobil filed an Appeal from the denial of its request for exception relief, Case Number FEA-07666. In that appeal Mobil submitted data indicating that, contrary to the FEA's conclusions, Mobil could indeed recover the extra costs currently allocated to exempt products by allocating those costs to general refinery products—the category of products specified in the exception request. Banks of unrecovered costs attributed to general refinery products are treated separately under the price regulation, 10 C.F.R. § 212.83(c)(2)(ii), and, at the end of 1975, Mobil would have had a net overrecovery of $30 million of costs attributable to general refinery products had it not transferred, as permitted by FEA regulations, $45 million of non-general refinery product costs to that category.

29. In a decision and order dated June 1, 1976, the FEA denied Mobil's appeal on grounds virtually identical to those expressed in the decision denying exception relief. *Mobil Oil Corporation*, 3 FEA (Transfer Binder) ¶ 80,643.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of the Amended Complaint and the parties in this action pursuant to 15 U.S.C. § 754(a)(1), 28 U.S.C. §§ 1331 and 2201, and 5 U.S.C. § 701 *et seq.*

2. There are no contested issues of material fact and the claims raised in plaintiff's Amended Complaint are therefore appropriate for disposition on summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. The amendment of the refiner price rules to require that product costs be apportioned volumetrically between regulated and exempt products was not mandated by the expiration of the Economic Stabilization Act. Instead, it was a policy decision made pursuant to the agency's rulemaking powers under the Emergency Petroleum Allocation Act ("EPAA").

4. In promulgating petroleum pricing and allocation regulations under authority of the EPAA, the FEO was required to consider the impact of the regulations on the nine statutory objectives of the EPAA that Congress directed the agency to achieve "to the maximum extent practicable." 15 U.S.C. § 753(b)(1).

5. The agency failed to weigh the objectives of the EPAA in formulating the challenged amendment. Since balancing of the statutory objectives is a prerequisite to valid exercise of the agency's rulemaking powers, its failure to do so in this instance renders the amendment void as beyond the statutory authority of the agency.

6. The statutory objectives of the EPAA constitute the minimum relevant factors which the agency must consider in exercising its rulemaking authority under that Act. Because it did not weigh those relevant factors in formulating the volumetric apportionment amendment, the agency's action was arbitrary and capricious as a matter of law and the amendment is therefore invalid.

7. The EPAA also mandates that the agency's regulations provide a reasonable mechanism for the dollar-for-dollar passthrough of increased costs of crude oil. EPAA § 4(b)(2) (current version at 15 U.S.C. § 753(b)(2)). The volumetric apportionment amendment is inconsistent with this statutory directive, causing Mobil to absorb 30 to 40 million dollars per year in increased costs. That level of cost absorption cannot be considered a reasonable mechanism for the dollar-for-dollar passthrough of costs. The amendment is therefore beyond the statutory authority of the agency and is void.

8. The agency's rulemaking activities are governed by § 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, which requires, *inter alia*, that the terms or substance of a proposed rule be published in the Federal Register, that the public be provided an opportunity to submit comments on the proposal, and that the agency consider relevant comments in preparing the final rules. The agency complied with none of these requirements. The volumetric apportionment amendment was promulgated as a final rule without prior notice or an opportunity to comment.

9. Compliance with the notice and opportunity for comment requirements of § 4 of the APA can be waived where the agency finds "good cause" to abandon one or both of them or the rule is merely interpretative. 5 U.S.C. § 553(b). Neither exception, however, is applicable here.

10. The agency's contention that "good cause" existed to dispense with rulemaking requirements in promulgating the amendment on April 30, 1974 is without merit. Although the expiration of that Act extinguished the agency's authority to regulate certain by-products of the refining process such as petroleum coke, it did not require the agency to amend its cost allocation formula. The Act's expiration therefore could not serve as a basis for a finding of "good cause" to dispense with the requirements of § 4 of the APA. Moreover, even if some modification of the cost allocation formula were required as a result of the Act's expiration, the agency would not be free to delay formulation of such an amendment until the last moment and then invoke the "good cause" exception. The agency was aware well in advance that the Act would expire and had ample opportunity to provide notice of and solicit comment on the proposed amendment.

11. The agency's *post hoc* contention that the amendment was merely interpretative and therefore not subject to the notice and comment requirements is incorrect. When the agency announced the challenged amendment, it invoked only the "good cause" exception as a reason for non-compliance with normal

rulemaking procedures. Even if the agency could properly raise the interpretative rule exception, it is inapplicable here. The amendment did not interpret the agency's statutory authority or its regulations. Furthermore, since the amendment had a substantial impact on the regulated industry, it could not be considered interpretative in any event.

12. Since the volumetric apportionment amendment was promulgated in violation of the procedures set forth in 5 U.S.C. § 553, it is void.

13. Because the amendment was never validly promulgated, the agency exceeded its statutory authority by refusing to grant Mobil's two requests for exception from the operation of the amendment.

14. The agency's denial of Mobil's June 5, 1974 Request for Exception was arbitrary and capricious because Mobil satisfied both the "serious hardship" and "gross inequity" criteria for the requested relief since the multi-million dollar cost absorption imposed on Mobil by the operation of the amendment satisfied by reasonable application of a "serious hardship" standard. That is especially so because Mobil was uniquely penalized under the regulation by virtue of its attempts to increase refinery yields through use of coker units thereby causing it to be, by a wide margin, the largest domestic producer of the by-product petroleum coke. Because of this unique situation, the amendment had a particularly severe effect on Mobil's operations, causing Mobil to suffer "gross inequity" as a result of the amendment. Since the agency provided no rational explanation of its denial of relief, its action must be set aside.

15. The agency's denial of Mobil's December 11, 1975 Request for Exception must be set aside for the same reasons stated above. While Mobil based its second request only on the "gross inequity" criteria, it provided ample evidence of the particularly adverse impact of the amendment on its operations and the agency provided no rational explanation for its failure to grant relief. In addition, the denial is arbitrary and capricious because the agency granted relief to another refiner who was less severely affected by the amendment. Although both the agency's regulations and fundamental fairness require reasonable consistency in granting or denying relief under similar circumstances, the agency provided no rational explanation for granting relief to one refiner and denying the same relief to Mobil.

Based on the foregoing findings of fact and conclusions of law, the Court concludes that plaintiff is entitled to judgment as a matter of law.

Signed and entered this the 31st day of January, 1979.

/s/ Joe J. Fisher
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

Civil Action No. B-76-273-CA

[Filed Jan. 31, 1979]

MOBIL OIL CORPORATION, PLAINTIFF

—against—

THE DEPARTMENT OF ENERGY and
DR. JAMES R. SCHLESINGER,
Secretary of Energy, DEFENDANTS

JUDGMENT

At Beaumont, Texas, after full hearing and consideration of the argument of counsel, plaintiff's and defendants' cross motions for summary judgment, the memoranda in support thereof and exhibits attached thereto and the pleadings herein, the Court made and filed its Findings of Fact and Conclusions of Law and determined that based thereon plaintiff's motion for summary judgment should be granted and defendants' motion for summary judgment should be denied.

Therefore, it is hereby ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's motion for summary judgment be, and the same is hereby, granted and that;

1. The amendment of 10 C.F.R. § 212.83(c)(2) on April 30, 1974, to require volumetric apportionment

of costs between covered and exempt products is null and void as being arbitrary and capricious;

2. The amendment of 10 C.F.R. § 212.83(c)(2) on April 30, 1974, is null and void as being beyond the agency's authority under the Emergency Petroleum Allocation Act of 1973, as amended;

3. The amendment of 10 C.F.R. § 212.83(c)(2) on April 30, 1974, is null and void as having been promulgated in violation of the notice and opportunity for comment provisions of the Administrative Procedure Act;

4. Defendants' decision and order dated December 2, 1974, in case no FEE-0896 and the denial of the appeal therefrom dated June 6, 1974, in case No. FEA-0336 are null and void as being beyond the agency's authority under the Emergency Petroleum Allocation Act of 1973, as amended, insofar as they purport to prevent Mobil Oil Corporation from allocating increased crude oil costs to regulated products;

5. The aforementioned decision and order and denial of the appeal are null and void as being arbitrary and capricious and not based on substantial evidence insofar as they purport to prevent Mobil Oil Corporation from allocating increased costs of crude oil to regulated products;

6. Defendants' decision and order dated January 23, 1976, in case No. FEE-2116 and the denial of the appeal therefrom dated June 1, 1976, in case No. FEA-0766 are null and void as being beyond the agency's authority under the Emergency Petroleum Allocation Act of 1973, as amended, insofar as they

purport to prevent Mobil Oil Corporation from allocating increased costs of crude oil to regulated products;

7. The aforementioned decision and order and denial of the appeal are null and void as being arbitrary and capricious and not based on substantial evidence insofar as they purport to prevent Mobil Oil Corporation from allocating increased costs of crude oil to regulated products;

8. At all times since April, 1974, Mobil Oil Corporation has been and is entitled to allocate increased crude oil costs to products regulated by defendants;

9. Defendants' motion for summary judgment is denied.

SIGNED AND ENTERED this 31st day of January, 1979.

/s/ Joe J. Fisher
United States District Judge

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-36

[Filed November 19, 1979]

MOBIL OIL CORPORATION, PLAINTIFF-APPELLEE

v.

DEPARTMENT OF ENERGY AND
CHARLES W. DUNCAN, JR.,
SECRETARY OF ENERGY,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of Texas
Beaumont Division

(B-76-283-CA)

(Argued September 28, 1979
Decided November 19, 1979)

Before INGRAHAM, MORGAN and GEWIN, Judges.

INGRAHAM, Judge.

This appeal by the defendant Department of Energy (DOE) arises from a decision of the district court that an April 30, 1974 amendment to the Mandatory Petroleum Price Regulations in Subpart E of Title 10 of the Code of Federal Regulations is null

and void.[1] Having traversed all the prescribed avenues for administrative relief, and finding each one a cul-de-sac, the plaintiff Mobil Oil Corporation brought this action in the district court challenging the validity of the amendment. The case was submitted on cross-motions for summary judgment. On January 31, 1979 the district court denied defendant DOE's motion for summary judgment and granted plaintiff Mobil Oil's motion for summary judgment. The court entered its findings of fact and conclusions of law, which findings supported Mobil's contentions in all respects. The DOE properly perfected its appeal to this court. For the reasons set out below we affirm the judgment of the district court with modification.

Mobil Oil Corporation, one of the nation's largest refiners of petroleum products, utilizes a secondary refining process involving the use of "coker units," the effect of which is to increase by as much as 20%

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[1] The regulation in this case was first issued by the Cost-of-Living Council under authority granted by the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. With the enactment in 1973 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, *et seq.*, the Federal Energy Office acquired the responsibility for administering the regulation. Subsequently, the FEO republished and renumbered the regulations without making any substantive changes. 39 Fed. Reg. 1924 (1974). After the enactment of the Federal Energy Administration Act, 15 U.S.C. § 761, *et seq.*, the Federal Energy Administration (FEA) became responsible for administering the regulations. The FEA became part of the Department of Energy (DOE) on October 1, 1977. 42 U.S.C. § 7151(a); Executive Order No. 12009, 42 Fed. Reg. 46267 (1977). Throughout this opinion the original defendants and their successors will be referred to as the DOE.

the refinery yield of gasoline and distillate. However, a necessary consequence of Mobil's use of this process is that Mobil also produces a very substantial quantity of petroleum coke, the solid residue of the process.

Petroleum coke produced at the refinery level consists of two different grades, one of which, because of its high sulphur content, has experienced a market decline in recent years due to increasing environmental concerns. It comes as no surprise that the bulk of Mobil's petroleum coke is of this high sulfur grade.

The controversy surrounds the April 30, 1974 amendment to the Mandatory Petroleum Price Regulations, the effect of which was to require Code of Federal Regulations [*sic*], the effect of which was to require that all products refined from crude oil, including those products newly exempted from regulation by the expiration on April 30, 1974 of the Economic Stabilization Act (ESA), 12 U.S.C. § 1904 note, bear their pro rata share of the refiner's increased crude oil costs. Among the exempted products after April 30, 1974 was petroleum coke; however, gasoline and distillates remained among the covered products under the successor statute, the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751, *et seq.* The operation of this amendment prevented Mobil from allocating any of its increased costs of crude oil to its covered products in any greater proportion than the volume of crude oil attributable to each of those products.

The relevant portion of the pricing formula that was affected by the amendment is referred to in the industry as the V factor. Created under the old Cost of Living Council (CLC) regulations, which were promulgated under the authority of the ESA, this factor was expressed as a fraction, the numerator of which was the total volume of a particular product or products category sold in a specified time period and the denominator of which was the total volume of all covered products sold in that same time period. On December 13, 1973, the V factor was carried over from the old CLC regulations to the successor regulations issued by the Federal Energy Office pursuant to the newly enacted EPAA, 15 U.S.C. § 751, *et seq.* The new regulations in large part merely recodified and renumbered the old CLC regulations applicable to refiners as 10 C.F.R. § 212.81, *et seq.* *See* 38 Fed. Reg. 34414 (1973).

Under the CLC cost apportionment scheme, product categories were designated as either "special products," which included gasoline, No. 2 diesel fuel and No. 2 heating oil, or "covered products other than special products," which consisted of all other products. Thus, all products refined from crude oil were regulated under the ESA.

The regulations specifically prohibited refiners from allocating any increased costs attributable to "covered products other than special products" to "special products." In other words, each "special product" could bear only its proportionate share by volume of crude oil costs. 6 C.F.R. § 356(c)(1)(i). Among "covered

products other than special products," however, a refiner was permitted to apportion increased product costs in any manner it deemed appropriate. *Id.* § 356 (c) (1) (ii).

The enactment of the EPAA brought a change to the CLC apportionment scheme. That legislation required the allocation and pricing of "all crude oil, residual fuel oil, and refined petroleum products." 15 U.S.C. § 753(a). Significantly, refined petroleum products were defined as "gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." *Id.* § 752(5). The EPAA thus exempted from regulation certain products previously regulated under the ESA, namely petroleum coke, petroleum wax, asphalt, road oil and refinery gas; in other words, refinery residue.

On April 3, 1974, in anticipation of the expiration of the ESA on April 30th, 1974, the DOE amended its regulations to exempt the products not covered by the EPAA from the coverage provisions of the agency's regulations.[2] At this time, just prior to April 30, 1974, the denominator of the V factor in the cost apportionment formula continued to refer to the total volume of "covered products" sold. Basically, as before, all increased products costs could be passed through in the prices of covered products. However, not all products were "covered products" anymore and therefore increased costs attributable to these exempt products could be passed through in the prices of cov-

[2] 39 Fed. Reg. 12353 (1974) (codified at 10 CFR §§ 210.34 and 212.31).

ered products. The DOE, believing that the EPAA did not permit such action, reacted by promulgating on April 30, 1974 the amendment at issue in this case.[3] Anxious to change the V factor before the ESA expired at midnight on April 30, 1974, and believing that an emergency situation existed, the DOE promulgated the amendment without any prior notice to interested parties or any opportunity for them to comment.

The amendment changed the denominator of the V factor in relevant part from "the total volume of all covered products sold" to "the total volume of all covered products and all products refined from crude petroleum other than covered products . . . ." 10 C.F.R. § 212.83(c) (2). Thus, the effect of the amendment was to preclude Mobil from apportioning any increased crude oil costs attributable to the exempt products, *inter alia* petroleum coke, to the prices of its covered products.

Mobil predicted that it would not be able to recover all of its costs in the prices of its high sulphur grade petroleum coke.[4] Therefore, on June 5, 1974, Mobil filed with the DOE a request for exception relief from the operation of the regulation. Such request was denied on the grounds that Mobil had suffered neither serious hardship nor gross inequity, one of which was

[3] 39 Fed. Reg. 15139 (1974) (codified at 10 CFR § 212.83 (c) (2).

[4] The record reveals that Mobil's prediction was correct, since the losses in 1974 and 1975 alone amounted to over $75,000,000.

necessary for relief. Subsequently another refiner whose situation was nearly identical to Mobil's was granted exception relief.[5] Mobil then applied for exception relief again, based on the grant of relief to the other refiner, and again relief was denied. The reasons offered by the DOE for its denial of Mobil's second request for exception relief were identical to its reasons given in Mobil's earlier denial of relief. The DOE opined that Mobil's case was substantially different from the other refiner's case.

Mobil, having thus exhausted all its administrative remedies, brought this action in the district court seeking declaratory relief. Mobil alleged primarily that the DOE's action in promulgating the amendment was arbitrary and capricious, in excess of the agency's statutory authority and an abuse of discretion. Mobil alleged also that the agency's two separate denials of exception relief were arbitrary and capricious, an abuse of discretion and unsupported by substantial evidence. The DOE answered, denying virtually every allegation. Mobil later amended its complaint to allege that the amendment had been promulgated in violation of the notice and comment provisions of § 4 of the Administrative Procedures Act (APA), 5 U.S.C. § 553.

Following extensive discovery, both parties moved for summary judgment. After written and oral arguments, the district court granted Mobil's summary judgment motion and denied the DOE's, finding the

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[5] *Getty Oil Co.*, 2 FEA ¶ 83,231 (Aug. 4, 1975).

April 30, 1974 amendment to the Mandatory Petroleum Price Regulations to be both substantively and procedurally invalid. The court also found that the DOE's denial on both occasions of Mobil's requests for exception relief was arbitrary and capricious and not supported by substantial evidence.

There are three questions presented for review in this appeal. We are asked to decide whether the agency action in promulgating the amendment of 10 C.F.R. § 212.83(c)(2) on April 30, 1974 was arbitrary, capricious and beyond the authority conferred by the EPAA, 15 U.S.C. § 751, *et seq.*; secondly, whether the amendment was improperly promulgated without compliance with the provisions of § 4 of the APA, 5 U.S.C. § 553; and finally, whether the DOE's denials of exception relief were within its authority and supported by substantial evidence. Our decision today is based narrowly upon affirmative answers to the first two questions. We need not reach the third question and we therefore decline to decide it.

The scope of our judicial review has been restated so often that further elaboration is unnecessary. We must simply determine under the guidelines set forth in § 211(d)(1) of the ESA, 12 U.S.C. § 1904 note, which by virtue of § 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1) governs our review here, whether there was substantial evidence in the record to support the findings of the district court that the promulgation of the amendment was in excess of the DOE's authority, was arbitrary and capricious or was otherwise unlawful under the Act. *Grigsby* v. *Department of*

Energy, 585 F.2d 1069, 1074 (TECA 1978), *cert. denied*, 99 S. Ct. 1216 (1979); *Texaco, Inc.* v. *FEA*, 531 F.2d 1071, 1076 (TECA 1976), *cert. denied*, 426 U.S. 941 (1976).

The DOE maintains that the district court applied an erroneous standard of review of action alleged to be arbitrary and capricious. It argues that judicial review of agency action is limited to a determination of whether the challenged action has a rational basis. In support of its position the DOE quotes language in *Pacific Coast Meat Jobbers Ass'n* v. *Cost of Living Council*, 481 F.2d 1388 (TECA 1975), affirming that the " 'judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' " *Id.* at 1391, *quoting Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-87 (1934). Furthermore, maintains the DOE, in applying this rational basis test, great deference is to be accorded the actions and decisions of the administrative agency.

The flaw in this argument stems from the agency's misconception of the applicable test. The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather, as noted in *Texaco, Inc.* v. *FEA*, *supra*, the inquiry is "whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body." 531 F.2d at 1076-77; *Bowman Transportation, Inc.* v.

Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). The enumeration by the *Texaco* court of the three elements in the conjunctive negates any implication that the rational basis test alone can suffice. The district court did not apply an erroneous standard of review.

Both parties agree that the factors set out in § 4 (b) of the EPAA, 15 U.S.C. § 753(b)(1), were relevant to the agency's decision.[6] No single factor is inherently more important than any of the other factors. Instead, as this court has held, all nine factors are to be balanced objectively. *Pasco, Inc.* v. *FEA*, 525 F.2d 1391, 1397 (TECA 1975); *Air Transport Ass'n of America* v. *Federal Energy Office*, 520 F.2d 1339, 1342 (TECA 1975); *Consumers Union* v. *Sawhill*, 525 F.2d 1068, 1079 (TECA 1975) (*en banc*). The statute provides that the agency action shall attempt to achieve those objectives "to the maximum extent practicable." 15 U.S.C. § 753(b)(1).

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[6] Some of the factors considered pertinent by both parties include:

> (D) preservation of an economically sound and competitive petroleum industry . . .;
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> * * * *
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at eqiutable prices . . .;
>
> * * * *
>
> (H) economic efficiency; and
>
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15 U.S.C. § 753(b)(1).

The disagreement lies in whether or not the agency was required to consider those factors prior to its promulgation of the amendment. We have already noted that the proper test includes a consideration of the relevant factors. *See Texaco, Inc.* v. *FEA, supra,* 531 F.2d at 1076-77. However, the DOE claims that since the amendment arguably fosters certain of the objectives, then the district court erred when it held the amendment invalid based upon the agency's failure to consider those objectives sufficiently.

It is clear from the record that at no time prior to promulgating the April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in § 753(b)(1). The agency admitted that it chose to adopt the volumetric apportionment scheme of cost allocation solely because that was the only method set forth in the regulations at that time. Additionally, the agency confessed that the sole purpose of the amendment was to conform the regulations to the expiration of the ESA, notwithstanding the EPAA requirement that the purpose of the regulations be to achieve those nine EPAA objectives to the maximum extent practicable.

It is therefore readily apparent to us that the agency neglected to fulfill its statutory command when it promulgated the amendment without considering the Act's objectives. As such, the DOE's action was beyond its statutory authority. *See Texaco, Inc.* v. *FEA, supra,* 531 F.2d at 1076-77. *See also Nader* v. *Sawhill,* 514 F.2d 1064, 1067 (TECA 1975). *Pacific Coast Meat Jobbers Ass'n* v. *Cost of Living Council,*

supra, on which the agency relies for its support, even notes that the district court "found that the defendant CLC *did consider all the factors involved* and the potential side effects of its action, and made a rational judgment in determining to act as it did." 481 F.2d at 1392 (emphasis added). From this, it may be inferred that the balancing of objectives which is required of the agency under *Consumers Union* v. *Sawhill, supra,* could not have occurred absent consideration of the objectives of the Act *before* promulgation of the amendment. Thus, the district court did not err when it found the promulgation of the amendment to be arbitrary and capricious and beyond the statutory authority of the agency under the EPAA.[7]

We next confront the DOE's argument that the challenged amendment conformed with the provisions of § 4 of the APA, 5 U.S.C. § 553, which is incorporated by reference in § 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1). This section provides for notice of proposed rulemaking by the agency and affords interested persons an opportunity to comment on and participate in the agency rulemaking. The April 30, 1974 amendment required inclusion within the V factor of the pricing formula the sales volumes of exempt

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[7] The district court also found that the amendment violated the dollar for dollar pass through provision of § 4(b)(2) of the EPAA, 15 U.S.C. § 753(b)(2). The grounds for our decision do not require resolution of that issue. Accordingly, we express no opinion on the district court's finding with respect to that point.

products, including petroleum coke. Under the CLC regulations in force prior to the April 30, 1974 amendment, refiners were permitted to allocate increased costs for "covered products other than special products," which category included petroleum coke, in any manner they deemed appropriate. It seems clear, therefore, that substantively the April 30, 1974 amendment altered the price regulation framework and the informal rulemaking accompanying the procedure was subject to the notice and comment standard.

The agency contends that its procedure satisfied an exception contained in the statute. Although the APA generally requires that during the course of an informal rulemaking interested parties be given notice and an opportunity for comment, § 553 provides that those requirements do not apply

> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding in a brief statement of reason therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b).

The DOE argues that it made and published a finding of good cause for dispensing with normal notice and comment requirements, thus clearing the procedural hurdle. Upon promulgation of the challenged

amendment, the agency incorporated therein its statement that:

> Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum price rules and regulations which apply to refiner's permissible prices in the month of May, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

39 Fed. Reg. 15139 (1974). The DOE submits that this finding constituted good cause.[8]

It is axiomatic that a mere recital of good cause does not create good cause. Similarly, a desire to provide immediate guidance, without more, does not suffice for good cause. In *Nader* v. *Sawhill*, *supra*, the court noted that if the "conclusory statement that normal procedures were not followed because of the

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[8] The DOE relies on *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (TECA 1977). In *National Helium* the court reviewed the events surrounding the passage of the EPAA and the expiration of the ESA and concluded that good cause did in fact exist for the DOE's promulgation of the April 3, 1974 amendment, regarding the statutory classification of various products as "covered products," without notice or opportunity to comment. That case involved essentially the same statement of good cause as was used by the DOE herein. However, the court's observation that "[n]otably the FEO *made no substantive changes in the price regulation framework* it had adopted on January 15 . . .," *id.* at 1142 (emphasis added), expresses the distinction between *National Helium* and the present case. Here there was definitely a substantive change in the price regulation framework. *See id.* at 1146 n.19.

need 'to provide immediate guidance and information . . . constitutes good cause, then an exception to the notice requirement would be created that would swallow the rule.'" 514 F.2d at 1068 (citation omitted).

The only other justification offered by the agency for its good cause finding appears to be that an emergency condition existed. More specifically, the rapidly approaching date of expiration of the ESA coupled with the agency's oversight regarding the effect of the expiration on the pricing formula provided the good cause necessary for dispensing with notice and comment. As the district court noted, the expiration of the ESA extinguished the agency's authority to regulate certain by-products of the refining process such as petroleum coke; however, it did not require the agency to amend its cost allocation formula. The ESA's expiration therefore could not serve as a basis for a finding of good cause to dispense with the notice and comment requirements. *Shell Oil Co.* v. *FEA*, 527 F.2d 1243 (TECA 1975), rejects the DOE's justification:

> The record clearly shows that good cause for avoiding compliance with the requirements of the Administrative Procedure Act did not exist in this case. The expiration of the Stabilization Act was not so unexpected as would have precluded advance notice by the FEA of its own proposed regulations for controlling rents and accepting comments thereon prior to April 30, 1974.

Id. at 1248. *See also United Steel Corp.* v. *Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979) (argument that statutory deadlines made prior notice and comment impracticable and contrary to the public interest rejected); *Sharon Steel Corp.* v. *Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979) (mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for dispensing with notice and comment).

The agency alternatively claims *post hoc* that the April 30, 1974 amendment was an interpretative ruling and therefore, under 5 U.S.C. § 553(b)(A), exempt from notice and comment requirements. If the DOE had concluded that either its statutory authority or the existing regulations were in need of clarification by way of an interpretative ruling, then it would have had no reason to incorporate a finding of good cause.

The agency attempts to generalize this argument by pointing out that in reality the April 30, 1974 amendment did nothing more than interpret the regulations as they existed prior to the April 3, 1974 amendment. However, it is clear that the April 3, 1974 amendment exempted products not covered by the EPAA. Thus, any "interpretation" of regulations concerning cost apportionment among those exempted products prior to their exemption from the Act's coverage is irrelevant. The court did not err when it found that the April 30, 1974 amendment did not

interpret the agency's statutory authority or its regulations.

The DOE's reliance on *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), for the proposition that the court is imposing on it a more stringent procedural requirement than Congress mandated in the APA is misplaced. We do not impose here any additional requirement; we merely intimate that the agency failed to satisfy the specific statutory directive that notice and an opportunity for comment accompany the rulemaking absent the existence of one of the exceptions. Our duty is to scrutinize the record to ascertain whether in fact an exception did exist. As was noted in *Vermont Yankee*:

> In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*.
> . . .

Id. at 548.

In sum, since none of the reasons advanced by the agency support a finding of good cause, and since the amendment cannot be considered an interpretative ruling, the district court did not err when it found the April 30, 1974 amendment of 10 CFR § 212.83

(c)(2) null and void as having been promulgated in violation of the notice and comment provision of the APA.[9]

The DOE also challenges the district court finding with respect to the denials of exception relief. The district court found that since the agency had granted identical exception relief to another refiner, which relief consisted of allocating to covered products those increased product costs arguably attributable to petroleum coke, then the agency's denial of Mobil's second request for exception relief was arbitrary and capricious, in excess of the agency's statutory authority and unsupported by substantial evidence. This finding, insists the agency, was error. Since we have already determined for other reasons that the challenged amendment was never validly promulgated, either substantively or procedurally, we assume, without deciding, that Mobil is in need of no exception relief from the operation of the amendment.

We note here that although the principal issue in this case is the validity of the April 30, 1974 amendment, it must be pointed out also that the district court judgment in holding the amendment invalid

---

[9] The DOE stresses the fact that subsequent rulemakings (concerning modification of the V factor and other allocation and cost formulas) were conducted with notice and comment, thus supporting its position that the V factor as modified by the April 30, 1974 amendment ought to be upheld. But if the agency deemed all those V factor rulemakings of a type that necessitated notice and comment, surely the April 30, 1974 rulemaking required no less. Moreover, the opportunity to comment after promulgation cannot substitute for notice and an opportunity to comment beforehand.

and permitting Mobil to allocate increased costs associated with exempt products to covered products apparently entitles Mobil to reallocate costs continuously from April 1974 up to the present. The agency alleges that this is incorrect.[10] We agree.

In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (codified in scattered sections of 5, 10, 15, 30, 42, 50 U.S.C.). That Act amended § 4(b)(2) of the EPAA, 15 U.S.C. § 753(b)(2) to provide in pertinent part that the regulations, in specifying prices or the manner in which prices are determined, "shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-B diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner. . . ." *Id.* § 753(b)(2)(B).

The argument is as follows: As of February 1, 1976, the effective date of the statutory amendment, the agency was prohibited from authorizing pass through of increased product costs to prices of specified products in any greater amount than a directly proportionate amount by volume. Since the effect of the district court judgment is to allow the pass through to *any covered products*, including those prod-

[10] Mobil, during the pendency of this appeal, filed a Motion to Strike certain portions of the agency's appellate brief and appendix, alleging that factual and legal matters not raised below were asserted initially on appeal to this court. We will decide the case on its merits and judicially notice the relevant statutes.

ucts specifically restricted by § 4(b)(2)(B) without any limitation on proportions by volume, then the percentage of total costs allocated to the specified products might be greater than a proportionate amount by volume. Thus, the judgment contravenes the statutory directive.

It may be argued, on the other hand, that so long as Mobil does not allocate increased product costs to those specified products in any greater amount than statutorily authorized, then the judgment does not conflict with the statute. However, we believe the decisive point is that the judgment permits unrestricted cost pass through to the specified products in a manner which might result in a greater than proportionate allocation by volume. For that reason alone, the judgment must be modified.[11] Accordingly, the case must be remanded to the district court for findings consistent with the foregoing comments.

In conclusion, we find that the district court did not err when it found the challenged amendment to

[11] The agency contends that a subsequent rulemaking in September 1974, concerning non-product cost pass through, also cures any defect in the April 30, 1974 amendment, since Mobil was given notice and an opportunity to comment at that time. However, Mobil's opportunity to comment in a subsequent rulemaking involving *non-product* cost pass through in no way substitutes for its right to comment in the prior *product* cost pass through rulemaking. Furthermore, the receipt of comments after promulgation cannot cure prior rulemaking defects. Consequently, the judgment was not incorrect insofar as it permitted to [*sic*] Mobil to allocate exempt product costs to covered products during the period of time between the September 19, 1974 [*sic*] rulemaking and the February 1, 1976 effective date of the congressional amendment to the EPAA.

the Mandatory Petroleum Price Regulations, 10 C.F.R. § 212.83(c)(2), promulgated on April 30, 1974 null and void as being arbitrary and capricious and beyond the agency's authority. Likewise, the district court did not err when it found that the agency did not comply with the requirements of § 4 of the APA, 5 U.S.C. § 553, thus rendering the amendment procedurally invalid. For the reasons discussed above, we do not decide the issue of whether the agency's denials of exception relief were arbitrary and capricious and unsupported by substantial evidence. Based solely upon the above narrow grounds the judgment is affirmed as modified.

AFFIRMED IN PART and REMANDED FOR FURTHER FINDINGS.

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-36

MOBIL OIL CORPORATION, PLAINTIFF-APPELLEE

v.

DEPARTMENT OF ENERGY AND
CHARLES W. DUNCAN, JR.,
SECRETARY OF ENERGY,
DEFENDANTS-APPELLANTS

Before INGRAHAM, MORGAN and GEWIN, Judges.

[JUDGMENT]

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Texas, Beaumont Division, and was argued by counsel. In consideration whereof,

IT IS ORDERED that the judgment of the district court is AFFIRMED IN PART and the case is REMANDED FOR FURTHER FINDINGS.

FOR THE COURT:

RUTH H. JACOBSON
Clerk

by: /s/ Donna M. Bold
DONNA M. BOLD
Chief Deputy Clerk

November 19, 1979

(District Court No. Civ. B-76-283-CA)

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-36

MOBIL OIL CORPORATION, PLAINTIFF-APPELLEE

v.

DEPARTMENT OF ENERGY AND DR. JAMES R. SCHLESINGER, DEFENDANTS-APPELLANTS

[ORDER]

Before HONORABLE JOE MCDONALD INGRAHAM, HONORABLE LEWIS R. MORGAN and HONORABLE WALTER P. GEWIN, Judges.

Upon consideration of Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*,

It is ORDERED that said Petition for Rehearing and Suggestion for Rehearing *En Banc* are DENIED. The mandate will issue on February 11, 1980.

FOR THE COURT:

RUTH H. JACOBSON
Clerk

by: /s/ Michael S. Levine
MICHAEL S. LEVINE
Deputy Clerk

February 4, 1980

APPENDIX F

5 U.S.C. 553 provides in part:

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * * * *

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

* * * * *

15 U.S.C. 753 provides in part:

(a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

APPENDIX G

COMPARISON OF PRODUCT COST ALLOCATION UNDER THE AGENCY'S REGULATIONS AND THE COURT OF APPEALS' DECISION

The following calculations are based on a refiner with $1000 of increased crude oil costs in a given period and the following petroleum product mix: (1) 40 gallons of gasoline, (2) 20 gallons of No. 2 oils and (3) 40 gallons of various other products, of which 10 gallons represent the five petroleum products exempted from coverage under the Emergency Petroleum Allocation Act.

Product Cost Allocation Under Regulations Prior to April 3, 1974

Gasoline:

40 gallons / 100 gallons (total "covered" products) x $1000 = $400

No. 2 Oils:

20 gallons / 100 gallons (total "covered" products) x $1000 = $200

Other Covered Products:

40 gallons / 100 gallons (total "covered" products) x $1000 = $400

= $1000

Product Cost Allocation Under Regulations After April 30, 1974

Gasoline:

40 gallons / 100 gallons (total "covered" and "exempt") x $1000 = $400

No. 2 Oils:

20 gallons / 100 gallons (total "covered" and "exempt") x $1000 = $200

Other Covered Products:

30 gallons / 100 gallons (total "covered" and "exempt") x $1000 = $300

= $900

The remaining costs (or more) could be recovered in free market prices of exempt products.

Product Cost Allocation Under Court of Appeals' Decision From April 30, 1974 to February 1, 1976

Gasoline:

40 gallons / 90 gallons (total "covered" products) x $1000 = $444.45

No. 2 Oils:

20 gallons / 90 gallons (total "covered" products) x $1000 = $222.22

Other Covered Products:

30 gallons / 90 gallons (total "covered" products) x $1000 = $333.33

= $1000

Costs may be recovered without limit in the price of exempt products.

Thus, if the April 30, 1974, amendment were invalid, 100% of the increased crude oil costs would be available for pass through in the prices of covered products even though those products represent only 90% of the refiner's total output. Moreover special products (*e.g.*, No. 2 oils and, for a time, motor gasoline) would bear more than a volumetric share of increased crude oil costs. Cost recovery in the sale of exempt products would be unlimited.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1365

DEPARTMENT OF ENERGY AND CHARLES W. DUNCAN, JR., SECRETARY OF ENERGY,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1365

Department of Energy and Charles W. Duncan, Jr., Secretary of Energy,

Petitioners,

v.

Mobil Oil Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

Questions Presented

The fundamental question raised in this case is whether the predecessor agency of petitioner, Department of Energy ("DOE"), may amend a regulation without regard for statutorily mandated rulemaking procedures and with no consideration of (i) the statutory objectives the regulation must achieve, (ii) the effect of the regulation on the industry, or (iii) any alternatives to the policy adopted in the regulation. Applying settled principles of administrative law which have been endorsed by this Court and affirming the decision of the United States District Court for the Eastern District of Texas, a unanimous panel of the Temporary Emergency Court of Appeals ("TECA") held that the agency has no such power.

The question arises with respect to an April 30, 1974 amendment to the Mandatory Petroleum Price Regulations which required respondent Mobil Oil Corporation ("Mobil") to absorb millions of dollars of actual costs incurred in acquiring crude oil. The specific questions raised by the petition are:

(1) Whether the court of appeals erred in finding that the agency's complete failure to consider the statutory objectives before promulgating the April 30, 1974 amendment rendered the amendment legally deficient.

(2) Whether the court of appeals erred in finding that there was no good cause justification for the agency's admitted failure to follow statutorily mandated rulemaking procedures.

(3) Whether, on the particular facts of this case, the court of appeals erred in finding that the April 30 amendment was not validly reestablished *sub silentio* by subsequent rulemakings involving other regulatory issues and in which the agency never considered either the rule adopted on April 30 or the policy implications of that rule.

(4) Whether, on the particular facts of this case, the court of appeals erred in failing to find that the April 30 amendment was a continuation of a previous rulemaking proceeding, even though the agency did not so argue in the courts below and even though the record reveals that during the prior rulemaking the agency never considered or intended to adopt the rule set forth in the April 30 amendment.

Statement of the Case

The facts of the case are set forth in the opinion of the court of appeals.[1] In light of the new arguments advanced in the petition, however, we amplify below the nature and significance of the regulatory amendment at issue as well as the scope of TECA's decision.

A. The Refiner Price Rules Before the April 30 Amendment.

The predecessors of the refiner price rules involved in this action were promulgated by the Cost of Living Council ("CLC") pursuant to the Economic Stabilization Act of 1970 ("ESA") as amended, 12 U.S.C. § 1904 note. 38 Fed. Reg. 22536 (Aug. 22, 1973). Those rules generally allowed a refiner to increase its prices by the "passthrough" of increased "product costs" (cost of crude oil and purchased product), allocating those costs to the regulated or "covered" products. Covered products were divided into two categories: 1) "special products" and 2) "covered products other than special products." Under the general rule, costs were computed as an aggregate which a refiner could allocate as it chose among individual products in the "other than special products" category.[2] Costs not passed through currently could be held available ("banked") for use in future months.

After enactment of the Emergency Petroleum Allocation Act ("EPAA")[3] and the transfer of CLC functions to the Federal Energy Office ("FEO"), the FEO repromulgated

1. The opinion is set forth as Appendix C to the petition at pages 18a—38a. (hereinafter "Pet. App.") "R." citations are to the Joint Appendix filed in the court of appeals.

2. The only exception to that rule required product cost increases to be attributed to each "special product" in an amount proportionate to the sales volume of that product.

3. Pub. L. No. 93-159, 87 Stat. 628 (1973) (present version at 15 U.S.C. §§ 751, *et seq.*).

the refiner pricing regulations on January 14, 1974, expressly retaining the pricing provisions adopted by CLC[4]. *See* 38 Fed. Reg. 34414 (1973); 39 Fed. Reg. 744; 39 Fed. Reg. 1924 (1974).

The January 14, 1974 regulations were adopted under the authority of both the EPAA and the ESA. Since the ESA extended to all petroleum products, the "covered products" to which the regulations applied included not only refined petroleum products but also the residue of the refining process such as petroleum coke. Petroleum coke is the residue which remains after secondary refining of crude oil in "coker units", a process which increases the yield of gasoline and distillates by as much as twenty percent.[5]

Since petroleum coke is comparable in value to coal rather than other petroleum products, it cannot be sold at a price which supports cost increases proportionate to its percentage of a refiner's sales. This had no significance while petroleum coke was a "covered product other than a special product" because increased costs could be recouped on the other products in that category. Even if cost increases in the "other than special products" category could not be recovered in a given month, they could be "banked" for later use.

Upon the expiration of the ESA on April 30, 1974, the FEO's authority was limited to the products covered by the EPAA—crude oil, residual fuel oil and refined petroleum products. In anticipation of that expiration, on

4. *See* 10 C.F.R. Part 212, Subpart E, 39 Fed. Reg. 1952 (Jan. 15, 1974).

5. Mobil makes extensive use of coker units and is by far the largest domestic producer of petroleum coke. Most of this residue has historically been suitable for mixing with coal, to be burned as fuel by electric utilities. Petroleum coke thus competes with coal rather than other petroleum based sources of energy and on a volumetric basis its value has no relationship to that of the primary products of the refining process.

April 3, 1974 the FEO amended the definition of "covered products", exempting certain products which, because they were not "refined petroleum products," the agency no longer had the authority to regulate. The products exempted were petroleum coke, petroleum wax, road oil, asphalt and refinery gas. 39 Fed. Reg. 12353-54 (April 5, 1974). The only effect of the April 3 amendment on the pricing formula was the reduction in the number of covered products. With the continued exception of special products, all product cost increases were still computed as an aggregate which a refiner could allocate as it chose among covered products.

B. The Refiner Price Rules After the April 30 Amendment.

Statutory decontrol presented the agency with a number of policy options respecting the cost apportionment formula and the effect of decontrol upon cost recovery, including whether any costs should be allocated to the decontrolled products and, if so, how. The FEO did not engage in a public rulemaking proceeding regarding these issues but further amended its regulations without notice or opportunity for comment when the ESA expired on April 30, 1974. The amendment required that a portion of increased crude oil costs corresponding to the volume of exempt products sold must be allocated to those products. 10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. 15139 (May 1, 1974). The increased costs thus allocated could only be recovered in the prices charged for the exempted products.

For the first time the regulations prohibited the pass-through of all product cost increases in the prices of covered products. Increased costs now had to be directly attributed to a new category—products exempted on April 3, 1974—and could be recovered, if at all, in sales of those products.

C. The Impact of the April 30 Amendment.

The April 30 amendment required a refiner to apportion increased costs between controlled products and those exempted on April 3 on the basis of volume. Since the exempt products are not refined petroleum products, their value is not comparable to that of an equivalent volume of the primary products of the refining process such as gasoline. They therefore cannot be sold at prices which permit recovery of the costs which had to be allocated to them under the April 30 amendment. In the case of petroleum coke, for example, Mobil would have had to sell that product at three times the price at which it was actually sold in order to have completely recovered the costs required to be allocated to it. Pet. App. 6a.

The comparatively low prices for petroleum coke were of no practical significance when it was a "covered product other than a special product" because increased costs could be shifted to prices of other products in the same category. The April 30 amendment, however, resulted in cost underrecovery and required Mobil to absorb over 75 million dollars of the increased crude oil costs it had to allocate to petroleum coke in 1974 and 1975 alone. Pet. App. 23a n.4.

D. The Proceedings Below.

Because it believed that the agency could not have intended to discourage the use of coker units which increase refinery yield, Mobil sought administrative relief pursuant to provisions which permit the agency to except a firm from the operation of a regulation which results in serious hardship or gross inequity. Declining to consider the "significant" policy issues concerning the rule's impact on national energy objectives, the agency denied Mobil's application and its appeal from that denial. Pet. App. 6a-7a. After the agency subsequently granted another refiner the relief Mobil had sought, Mobil reapplied and relief was again denied. Pet. App. 7a-8a. Having exhausted all administrative avenues, Mobil brought this action.

Discovery in the district court focused upon the agency's action in promulgating the April 30 amendment and sought explication of the reasoning and consideration underlying that amendment. The record revealed that the only documents relevant to the April 30 amendment were the *Federal Register* publication of April 30 and a draft of that publication dated the same day which the agency declined to produce. R. at 43, 52. The record also revealed that the agency had not considered the effects of the April 30 amendment. The agency admitted, for example, that it had never considered how the amendment would affect the recovery of increased crude oil costs in sales of petroleum coke or other residue of the refinery process. R. at 56. The agency also stated that it had not considered the amendment's effect upon the supply of refined petroleum products or the ability of refiners to increase that supply by use of coker units. R. at 97. Although the amendment apportioned costs to refinery residue on a volumetric basis, the agency admitted that it had never considered the amendment's impact upon the price of, supply of, and demand for petroleum coke. R. at 36. Finally, the agency stated that it had failed to consider any alternatives to the cost allocation method adopted in the April 30 amendment. R. at 96.

Upon cross-motions for summary judgment, the district court granted judgment in favor of Mobil, finding the April 30 amendment procedurally and substantively invalid. The court held that, as revealed by the record, the agency had failed to consider the factors relevant to lawful rule-

making—in this instance, the statutory objectives of the EPAA which Congress directed the agency to achieve "to the maximum extent practicable." *See* 15 U.S.C. § 753(b)(1). Pet. App. 10a. The court also held that, as evidenced by the substantial cost absorption imposed upon Mobil, the amendment did not provide a reasonable mechanism allowing a dollar-for-dollar passthrough of increased crude oil costs as required by the statute.[6] App. 11a. The court similarly rejected the agency's argument that the imminent expiration of the ESA constituted "good cause" for its failure to observe rulemaking procedures. Based upon the uncontroverted record, the court held that "the agency was aware well in advance that the Act would expire and had ample opportunity to provide notice", and was not "free to delay formulation of such an amendment until the last moment and then invoke the 'good cause' exception." Pet. App. 12a. The court reasoned alternatively that since the April 30 amendment was a policy decision not required by the expiration of the ESA, that Act's expiration could not justify the violation. Pet. App. 12a. The district court also rejected the agency's *post hoc* assertion that the rule was interpretive and therefore not subject to statutory rulemaking procedures. Pet. App. 12-13a. Finally, finding that "Mobil was uniquely penalized under the regulation by virtue of its attempts to increase refinery yields through use of coker units" (Pet. App. 13a), the court found that the denials of Mobil's requests for exception relief were arbitrary, capricious and unsupported by substantial evidence. Pet. App. 13a-14a.

Upon appeal, TECA declined to decide whether the amendment violated the dollar-for-dollar passthrough provision of the EPAA or whether the denials of Mobil's exception requests were proper. Finding that "it is clear from the record that at no time prior to promulgating the

6. *See* 15 U.S.C. § 753(b)(2)(A).

April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in § 753(b)(1)," a unanimous panel of the court of appeals affirmed the district court's holding with respect to the substantive invalidity of the April 30 amendment. Pet. App. 28a. Regarding the agency's failure to comply with the Administrative Procedure Act, TECA exercised its "duty . . . to scrutinize the record to ascertain whether in fact an exception [to the rulemaking requirements] did exist". Pet. App. 34a. The court found that "none of the reasons advanced by the agency supports a finding of good cause" and that the amendment was not interpretive. *Id.* When TECA declined to review those findings on rehearing, the agency brought its petition to this Court.

Reasons for Denying the Petition

The decision below does not announce a novel rule of law, address a question of first impression or implicate any of the considerations which normally warrant review by certiorari. Petitioners do not claim otherwise, contending instead that review is appropriate because the decision was incorrect and might permit substantial amounts of refiners' costs to be used to increase prices of motor gasoline. As shown below, the decision of the court of appeals, the monetary consequences of which have been mischaracterized by petitioners, was founded upon settled principles of law and does not warrant review.

Contrary to the impression created by petitioners, the decision below did not strike down the agency's cost-allocation formula. Pet. 2. The regulation at issue apportioned costs on the basis of volume to the residue of the refining process, products which are not "refined petroleum products" and which do not have a value equivalent to that of the

primary objects of the refining process. As a result, Mobil was required to absorb millions of dollars of costs, primarily because it furthered national energy objectives by increasing refinery yield. Expressly emphasizing that its decision was based on "narrow grounds" (Pet. App. 38a, 25a), the court below found the amendment void because of the agency's rulemaking violations but otherwise left the regulatory system and the cost-allocation formula intact.

Rather than conflicting with the decisions of this Court or the other courts of appeals, the decision below falls squarely within the mainstream of settled administrative law. Indeed, the only real questions raised in the petition do not involve legal principles but turn upon the particular facts of this case. Since TECA's decision is dependent upon the facts attending the April 30 amendment, the issues decided below will not recur. Notwithstanding, petitioners seek to have this Court embark upon "a journey through the intricate labyrinth known as the DOE regulations"[7] in search of that which two courts were unable to find—proof that the agency actually considered the statutory objectives in promulgating the April 30 amendment and proof that the agency's admitted disregard of rulemaking procedures was justified by good cause. This Court has previously noted that certiorari is not warranted to review such factual issues. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Application of that rule is particularly appropriate where, as here, the findings of fact of the district court have received the unanimous concurrence of the court of appeals. In such cases, this Court's review is normally withheld "in the absence of a very obvious and exceptional showing of error." *Graver Mfg.*

7. *Grigsby* v. *DOE*, 585 F.2d 1069, 1073 n.8 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

Co. v. *Linde Co.*, 336 U.S. 271, 275 (1949).[8] Review by certiorari here is particularly unwarranted since TECA is a court vested with nationwide jurisdiction which has developed unique expertise in applying the complex regulations at issue and, as shown below, its findings were compelled by the record.

I.

The April 30 Amendment Was a Policy Decision of the Agency, Not a Necessary Corollary to Prior Regulations

Petitioners seek to portray this case as presenting the question whether, having decided in a public rulemaking to adopt a rule, an agency may correct its inadvertent misstatement of that rule without further rulemaking or decisionmaking. Pet. 14-17. That question is simply not presented in this case. The rule adopted on April 30 was not proposed in December 1973 or adopted either on January 14 or April 3; petitioners do not contend otherwise. Instead, their position rests on a characterization of the April 30 amendment as an inexorable result of statutory decontrol—a "corollary" that was "necessary" to "carry forward the old formula" (Pet. 8, 18)—which was *sub silentio* intended in January but inadvertently omitted. The April 30 amendment, however, represented a substantial departure from the January 14 regulations. It required the direct apportionment of costs to refinery residue for the first time, reduced refiners' prior flexibility in cost apportionment and resulted in substantial cost absorption by

8. *See also Branti* v. *Finkel*, 48 U.S.L.W. 4331, 4332 n.6 (March 31, 1980); *Berenyi* v. *Inmigration Director*, 385 U.S. 630, 635 (1967); *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Mobil.[9] As both courts below held,[10] the amendment represented a policy decision implementing regulatory changes the agency wished to adopt in light of decontrol.

The ESA's expiration only required the decontrol of products not subject to regulation under the EPAA, an obligation the agency fulfilled on April 3. Deregulation presented the agency with a number of options, none of which was the inevitable result of decontrol. First, the agency might have determined that no costs are properly attributable to refinery residue, a view which several authorities support.[11] That determination would have permitted a firm, as a whole, to increase profits, a logical result of decontrol, and would have provided an incentive for increased refinery yield. This was the rule the agency adopted on April 3.[12]

Second, if it believed that certain costs should be attributed to refinery residue, the agency then was obliged to determine how that might fairly be accomplished in light of the lower value of the decontrolled products.[13] For

9. The agency itself had determined that the amendment's impact was sufficiently harsh to justify exception relief to another refiner, and the district court held that the failure to grant similar relief to Mobil was arbitrary. Pet. App. 13a.

10. Pet. App. 10a, 32a.

11. *See, e.g.*, A. MATZ, *et. al.*, COST ACCOUNTING, 696-724 (5th ed. 1972); M. SCHIFF and L. J. BENNINGER, COST ACCOUNTING, 329-50 (2nd ed. 1963).

12. Even if it is assumed that the agency never intended to adopt such a rule (Pet. 16), it was obliged to consider the statutory objectives respecting the policy which it claims it did intend to adopt (*i.e.*, the April 30 rule). Such a policy, as any rule, is subject to rulemaking. Certainly an agency's prior errors standing alone cannot justify its adoption of a new policy without regard for the statutory objectives or compliance with rulemaking requirements.

13. The agency itself now recognizes that "covered products" properly bear a greater than volumetrically proportional amount of costs. *See* 44 Fed. Reg. 15660 (1979) (greater than volumetric apportionment to gasoline under existing regulations).

example, it could have adopted a scheme which ensured that refiners could recover all of, but no more than, their costs. A third option, which the agency adopted on April 30, was the attribution of costs to the decontrolled products on a volumetric basis. Under that rule, decontrol had the anomalous effect of requiring refiners such as Mobil to absorb substantial costs.

Thus, petitioners' suggestion that the April 30 amendment was nothing more than a necessary correction of an inadvertent error is unsupportable. As the courts below correctly found, that amendment was plainly a substantive policy decision made pursuant to the agency's rulemaking powers. Pet. App. 10a, 32a.

II.

TECA Did Not Err in Finding that the April 30 Amendment Was Substantively Invalid

This Court has consistently held that, in exercising judicial responsibility to review agency action alleged to be arbitrary and capricious, a court is obliged to determine whether the agency based its decision on "a consideration of the relevant factors." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-03 (1978). The court of appeals was plainly justified in applying this standard, Pet. App. 26a-28a, a fact which petitioners now appear to concede. Pet. 22. Nor do petitioners disagree with respondent or both courts below that the factors which, at a minimum, were relevant to the April 30 amendment were the nine statutory objectives which any EPAA

regulation must provide for "to the maximum extent practicable." 15 U.S.C. § 753(b)(1). *See* Pet. App. 27a-29a.

Petitioners contend, though, that TECA assumed the agency must give detailed consideration to each objective in all agency actions. Pet. 23. But that contention is mistaken, for TECA only held that, on the facts of this case, the agency's wholesale failure to consider and balance the statutory objectives as a whole rendered its action legally deficient. *See* Pet. App. 27-28a.[14]

Petitioners also take issue with TECA's factual finding that the agency did not consider the statutory objectives. That finding was compelled by the record, which overwhelmingly demonstrated that the agency had not only failed to consider relevant factors, it did not engage in any reasoned consideration whatsoever. *See* discussion *supra* at 7.[15]

14. Similarly, the district court did not hold that the agency must give detailed consideration to each objective. It held that the agency must "weigh" and "balance" the objectives. *See* Pet. App. 10a-11a.

15. Having not considered the April 30 amendment's impact on, for example, the supply of refined petroleum products (R. at 97), the agency could not argue that it considered the EPAA objective of "equitable distribution of . . . refined petroleum products." 15 U.S.C. § 753(b)(1)(F). Having not considered the impact of the April 30 amendment on refiners' ability to recover costs, or the price, supply of or demand for the products to which it apportioned costs (R. at 36, 56, 97), the agency could not have considered whether it minimized economic distortion, preserved an economically sound industry, or achieved economic efficiency. §§ 753 (b)(1)(D), (H), (I). Indeed, the agency does not and cannot argue that it fulfilled its statutory mandate to achieve these EPAA goals to the "maximum extent practicable" since it admitted that it never considered *any* alternatives to its action (R. at 96) let alone those which might accomplish the statutory objectives to a greater extent. Yet rulemakers must conduct "a considered evaluation of the presently available alternatives." *Pillai* v. *CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973). Where the agency fails to consider alternatives to its action, that action is properly voided "as either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." *Id.* at 1030.

TECA's task in determining whether the agency had in fact considered the statutory objectives was considerably eased by the agency's failure to assert that it had and its argument that it need not have done so. Indeed, even here, the agency has not affirmatively asserted that it ever engaged in such consideration, leaving to a footnote its contention that the stated purpose of the amendment was consistent with *one* objective.[16] In light of this record, TECA properly concluded that "it is clear from the record that at no time prior to promulgating the April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in § 753(b)(1)" and that "[i]t is therefore readily apparent . . . that the agency neglected to fulfill its statutory command when it promulgated the amendment without considering the Act's objectives". Pet. App. 28a.[17] That factual finding does not warrant review by certiorari.

16. The agency argues (Pet. 24-25 n.19) that the one statutory objective it may have considered is that of achieving "equitable prices," referring to the preamble's statement that § 212.83 was amended "to insure that all of the increased cost of crude oil processed by a refiner is not allocated to covered products, which now constitute less than all of a refiner's production." 39 Fed. Reg. at 15139. However, the Conference Report on the EPAA indicates that equitable prices imply "an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." H.R. CONF. REP. NO. 93-682, 93RD CONG., 1st Sess., *reprinted in* [1973] U. S. CODE CONG. & AD. NEWS 2688, 2703. *See also* Air Transport Ass'n of America v. Federal Energy Office, 382 F. Supp. 437, 445-46, 452 (D.D.C. 1974), *aff'd*, 520 F.2d 1339 (TECA 1975). Yet the agency has stated that no consideration was given to the impact of the amendment on the supply of refined petroleum products in the United States. *See* R. at 97.

17. Petitioners' statement that "the courts below erred in failing to identify a single relevant consideration that the agency arbitrarily failed to take into account" (Pet. 24) simply ignores the holdings and functions of both courts. TECA identified several of the

Finally, petitioners' statement that neither court below disagreed with the agency's view that the April 30 amendment was a "rational accommodation of the statutory goals" (Pet. 23), while technically correct, is misleading. Having found that the agency had failed to meet the threshold test of considering the statutory objectives, neither court had occasion to reach the question whether the amendment had a rational basis or presented a clear error of judgment. Had they been required to reach those questions, we submit that they would have found that a rule which volumetrically apportions costs among products whose values are not even remotely related on a volumetric basis is *per se* irrational. We also believe the courts below would have been compelled to find the rule invalid in light of the agency's own conclusion elsewhere that a rule which requires substantial cost absorption, as the April 30 rule did, contravenes the statutory objectives.[18]

III.

The Agency's Rulemaking Violations Do Not Merit Review By This Court

In *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 303 (1979), the Court noted that to "assure fairness and mature consideration of rules of general application", "courts are charged with ... ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* at 313 (citation omitted). Applying

statutory objectives that the agency conceded were relevant but which the agency arbitrarily failed to consider. Pet. App. 27a—28a & n.16. The court's role came to an end upon that finding. Surely petitioners cannot contend that a court is obliged to prepare a further list of the agency's failings.

18. 41 Fed. Reg. 5116 (1976).

these principles, the courts below found the April 30 amendment void because of the agency's failure to follow required rulemaking procedures.

The agency contended that the April 30 amendment fell within the exception to 5 U.S.C. § 553(b) which applies "when the agency for good cause finds (*and incorporates the finding and a brief statement of reasons therefor in the rules issued*) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[19] This was the only exception invoked by the agency in promulgating the April 30 amendment; it stated that normal rulemaking procedure is "impracticable"[20] and that "good cause exists" solely "[b]ecause the purpose of these amendments is to provide immediate guidance and information...." 39 Fed. Reg. 15139. TECA held first that this stated justification was inadequate.[21] Then, going beyond the agency's contemporaneous explanation and examining the facts surrounding the April 30 amendment, TECA found that there was no factual basis for a finding of "good cause."

The only other justification the agency offered to TECA was the imminent expiration of the ESA, but, as TECA found, "the record clearly shows that ... [t]he expiration of

19. The italicized language was omitted in petitioners' quotation of the statutory exception. Pet. at 18.

20. Contrary to the statement in the petition, the agency did not make a finding that notice and comment were "unnecessary, or contrary to the public interest." *Compare* Pet. 18 *with* 39 Fed. Reg. 15139.

21. TECA noted that "a mere recital of good cause does not create good cause" and examined the reasonableness of the agency's good cause determination. The court applied its prior holding in *Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (TECA 1975) and held that "a desire to provide immediate guidance, without more, cannot suffice for good cause", for to allow such "conclusory statements" to exclude the public from participation in the rulemaking would create an exception "that would swallow the rule." Pet. App. 31a-32a.

the Stabilization Act was not so unexpected as would have precluded advance notice." Pet. App. 32a. That factual finding was plainly compelled by the record[22] and consistent with the decided cases, *see United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir. 1979); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (3d Cir. 1979); *Shell Oil Co.* v. *FEA*, 527 F.2d 1243, 1248 (TECA 1975).

Both courts below also found that there was an alternative reason why the expiration of the ESA could not justify the agency's dispensing with rulemaking proceedings. The April 30 amendment was not required by the ESA's expiration but was instead a policy decision by the agency. Pet. App. 10a, 32a. *See* discussion *supra* at 11-13. TECA's conclusion that such a decision was subject to rulemaking proceedings was correct, especially since "with the consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate." *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 316.

Respondent submits that these factual findings of the court of appeals, compelled by the record, do not warrant review. Nor does petitioners' contention that the courts below improperly engaged in *de novo* review and "should have limited their scope of review to whether a reasonable basis existed for the agency's 'good cause' determination". Pet. 19. As we have shown, both courts first examined

22. The allocation regulations adopted by the agency in January 1974 as a result of the December 1973 rulemaking, unlike the pricing regulations, reflected only authority granted by the EPAA. The agency was aware then of the difference in scope between the EPAA and the ESA since it specifically excluded from allocation coverage the products which were subsequently decontrolled for pricing purposes on April 3. *See* 10 C.F.R. § 211.1(b)(3), 39 Fed. Reg. 1924, *et seq.* (1974). In addition, the agency was on notice of the ESA's expiration for a full year. *See* Pub. L. No. 93-28, 87 Stat. 27 (1973).

the reasonableness of the agency's contemporaneous "good cause" determination and found it inadequate. Although they might properly have ended their inquiry at that stage,[23] they nevertheless examined the reasons advanced after the fact by the agency in support of its "good cause" determination. Since the agency had not relied upon those reasons at the time, the courts' review was necessarily *de novo*. Having itself urged that such a review be undertaken, the agency can hardly claim that TECA's doing so warrants review by this Court.[24]

TECA and the district court were also compelled to reject the agency's *post hoc* argument that the April 30 amendment was an interpretive rule not subject to 5 U.S.C. § 553.[25] Linguistically, of course, the contention is absurd, for it argues that the agency may "interpret" the term "covered products" to mean "covered products and all products refined from crude oil other than covered products." More importantly, as we have previously shown, the April 30 amendment "was definitely a substantive change in the price regulation framework." Pet. App. 31a n.8. Since the agency itself admitted the amendment was "sub-

23. The principle that an agency's action must be judged "solely by the grounds invoked by the agency" is well accepted. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). *See also, e.g., Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Ashland Oil, Inc.* v. *FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976).

24. The agency argued below that "a court may go beyond the agency's published justification and uphold the procedural validity of a regulation," Br. at 32 n.16.

25. Petitioners' suggestion that the decision below conflicts with *Mitchell* v. *Edward S. Wagner Co.*, 217 F.2d 303 (2d Cir.), *cert. denied*, 348 U.S. 964 (1954) and similar decisions (Pet. 20-21 & n.14) is unsound. This case, like each of those cases, turns upon the particular facts surrounding the regulatory system and the rule claimed to be "interpretive."

stantive in its effect," R. at 414, and since it substantially altered refiners' rights and obligations, it was clearly not interpretive.[26]

IV.

Petitioners' Assertion That Subsequent Rulemakings Regarding Other Regulatory Issues Cured the Agency's Violations Is Without Merit and Review Is Unwarranted

In an eleventh hour attempt to avoid the consequences of its disregard of both the substantive and procedural prerequisites for lawful rulemaking, the agency argued for the first time in TECA that subsequent rulemaking proceedings, unrelated to the issues presented by the April 30 amendment, cured the amendment's deficiencies. Although the court of appeals might have refused to entertain such new issues and arguments[27], the court ruled upon the issue over Mobil's strenuous objections. *See* Pet. App. at 36a n.10.

TECA correctly rejected the agency's contentions for two reasons, neither of which merits this Court's review. First, 5 U.S.C. § 553 requires the agency to provide for notice and comment prior to the promulgation of a rule, not after it has been adopted. Pet. App. 35a n.9, 37a n.11. The principle is both well settled and soundly based:

> Provision of prior notice and comment allows effective participation in the rule making process while the decision maker is still receptive to information

26. *See Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 302 (alteration of rights and obligations is an "inherent characteristic" of substantive rules).

27. *See, e.g., Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976) ("of course, . . . a federal appellate court does not consider an issue not passed upon below"); *Miller* v. *Avirom,* 384 F. 2d 319, 321-323 (D.C. Cir. 1967).

> and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decision maker is likely to resist change.

Sharon Steel Corp. v. *EPA,* 597 F. 2d 377, 381 (3d Cir. 1979); *accord, United States Steel Corp.* v. *EPA,* 595 F. 2d 207, 214-215 (5th Cir. 1979). *See also Maryland* v. *EPA,* 530 F. 2d 215, 222 (4th Cir. 1975), *vacated on other grounds,* 431 U.S. 99 (1977); *Standard Oil Co.* v. *DOE,* 596 F. 2d 1029 (TECA 1978).

Second, the simple fact is that petitioners did not and cannot point to any subsequent rulemaking in which the agency considered or allowed public commentary on a proposal relating to the issues involved in the April 30 amendment—whether product costs may properly be attributed by volume to the refinery residue exempted on April 3. Instead, petitioners invoke sweeping generalities regarding the scope of this case and then cite to subsequent rulemakings involving, *e.g.,* proposed amendments to the "special products" rule or the decontrol and allocation of costs to fuel oils. *See* Pet. at 11 & n.6. But as TECA recognized,[28] this case does not concern the validity of the special products rule, decontrol decisions or allocation of costs to fuel oils. It concerns instead a rule apportioning

28. *See* Pet. App. at 35a n.9, 37a n.11. Petitioners have asserted that TECA was unaware that the agency had subsequently amended the allocation formula. Pet. 25. That is incorrect, for TECA expressed its awareness of "subsequent [ ] rulemakings concerning modification of the V factor and other allocation and cost formu' s". Pet. App. 35a n.9. Nor did TECA err in noting that the regulatory amendments adopted on December 5, 1974 concerned non-product costs only. *See* Pet. 25. Although the September notice invited comments respecting amendments to the "special products" rule which are not relevant here, the agency itself expressly stated that the amendments adopted as a result of that notice on December 5, 1974 concerned only non-product costs. 39 Fed. Reg. 42368 (1974).

costs to refinery residue volumetrically. The record below showed that the agency never considered the impact of that rule and never complied with the commard of Congress to allow public participation in the decision to implement such a rule. TECA was plainly correct in finding that the agency's obedience to statutory requirements in promulgating other rules involving other products and implicating different issues did not alter the fact that it had failed to do so with respect to the only rule at issue in this case—the April 30 amendment. Petitioners have advanced no reasons why TECA's findings warrant review in this Court.

V.

The Argument Raised For the First Time In the Petition Does Not Warrant this Court's Review

Rather than limiting themselves to the questions presented to the district court and the questions they first raised in the court of appeals, petitioners devote a substantial part of the petition to a new explanation of the agency's actions, asserting for the first time that the April 30 amendment was a "continuation" of the rulemaking proceedings which ended on January 14, 1974. Pet. 14-17 & n.17. They seek to have this Court review the arguments advanced under counsel's new theory, even though the issues were neither presented to nor decided by either court below and even though there are no "exceptional circumstances" which justify such review. In any event, petitioners' belated theory is wholly lacking in merit, founded as it is upon a substantial mischaracterization of both the April 30 amendment and the agency action in its promulgation as well as a serious misstatement of the authorities upon which the argument rests.

A. This Case Does Not Present the Exceptional Circumstances Which Warrant Departure From Accepted Appellate Practice

It is of course a long established rule that "[o]nly in exceptional circumstances will this Court review a question not raised in the court below." *Lawn* v. *United States,* 355 U.S. 339, 362-63 n. 16 (1958).[29] Rather than implicating "exceptional circumstances" which would justify departure from the settled rule, application of that rule is especially appropriate in this case.

A necessary foundation for petitioners' new argument that the April 30 amendment was a "continuation" of the January 14 rulemaking is the factual assertion that the agency believed it was continuing the prior rulemaking and its substantive and procedural failures were therefore justified. It is also dependent upon the claim that in December 1973 the agency intended to adopt the rule established on April 30. Surely, where such facts are solely within its control, the agency is obliged to inform the courts and the parties of the basis for and intent of its action. Although it submitted in excess of 550 pages of briefs and exhibits to the district court and raised two new arguments in the court of appeals, the agency never offered the "continuation" explanation in either court. As one court has noted in examining the sound policies supporting rejection of new arguments upon appellate review, the rule "requires [the parties] to deal fairly and frankly with each other and with the trial tribunal." *Miller* v. *Avirom,* 384 F.2d 319, 322 (D.C. Cir. 1967). If petitioners' present explanation

29. *See also, e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1975); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Neeley* v. *Eby Construction Co.,* 386 U.S. 317 (1967); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

of the basis for the agency's actions is accurate, the agency's refusal to reveal that basis before now was a gross disservice to respondent and both courts below.[30]

Respondent submits that a new argument raising fact issues uniquely within the control of petitioners and contrary to petitioners' representations to both courts below is not worthy of this Court's attention.

B. Petitioners' New Argument is Without Merit

Apart from the fact that it is not properly before the Court, the "continued rulemaking" argument lacks substantive merit.

Petitioners' position is dependent upon their assertion that the April 30 amendment was nothing more than a necessary corollary to prior regulations. Pet. 8, 18. As previously shown, however, the April 30 amendment was not necessary. It was instead a policy decision which resulted in a substantial departure from the January 14 regulations as proposed in December of 1973. Since the

30. Petitioners concede that their "continued rulemaking" argument was not raised below, but assert that "the agency did advance arguments directly supporting that analysis." Pet. 17 n. 13. To the contrary, petitioners' present argument is inconsistent with their position below. For example, the agency expressly admitted below, and the regulatory preamble stated, that the April 30 amendment was enacted *without* prior notice because "good cause" existed. In their answer to Paragraph 23 of the Amended Complaint, petitioners stated: "Defendants admit that the April 30, 1974 amendment . . . was enacted without prior notice." R. 83. Contrary to their prior representations, petitioners now assert that such notice had been provided in December 1973 and "a second, duplicative notice . . . was not required." Pet. 17. Similarly, although the agency conceded below that it had not considered all of the statutory objectives (arguing that such consideration was not required), in its petition the agency has for the first time asserted that such prior consideration took place. Pet. 17. The agency's argument below that the April 30 amendment interpreted the January 14 regulations is similarly inconsistent with its present assertion that the amendment was in fact part and parcel of the January 14 regulations.

April 30 rule was substantially different from both the December 1973 proposal and the January 14 regulations, that prior rulemaking did not and could not provide the notice and comment period required by statute.

As noted previously, it is axiomatic that an agency's actions must be judged by its own contemporaneous conclusions, not by appellate counsel's rationalization after the fact.[31] In this case, the agency never stated that the rulemaking proceeding which closed on January 14 would continue nor did it state that the April 30 amendment was part of a continued rulemaking. Petitioners' new argument is not only unsupported by the contemporaneous record, the record contradicts it. For example, petitioners' assertion that the April 3 and 30 amendments were an intended "continuation" of the January 14 regulations is expressly contradicted by the agency's unequivocal statement at that time that "no specific future changes are currently anticipated." 39 Fed. Reg. 1924 (1974). Although the agency has evidenced its ability to state expressly that regulatory amendments were "corrective" and therefore part of the original rulemaking (40 Fed. Reg. 39849 (1975)), it did not do so here, relying instead on the "good cause" exception in 5 U.S.C. § 553. Similarly, petitioners argue that the April 30 amendment was part of the agency's "original intent" in January 1974. The rulemaking record, however, reveals that on January 14 the agency was well aware of the difference in scope between the ESA and EPAA[32] and fully intended to exercise pricing authority under both acts

31. *E.g., Investment Co. Institute* v. *Camp,* 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1952).

32. *See* discussion, *supra,* at n. 22.

until the expiration of the ESA.[33] Having never intended to narrow the scope of the pricing regulations in January 1974, petitioners cannot now claim that the agency then intended to adopt what they characterize as a "corollary" to that reduction in scope.

Even if petitioners could clear these factual hurdles, their "continued rulemaking" argument is not supported by the authorities upon which they rely. It is true that in *American Trucking Associations* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), this Court held that the ICC may reopen its proceedings to correct an inadvertent error. The Court held, however, that the agency's power to correct its inadvertence "may only be exercised after proper opportunity for notice and hearing." 358 U.S. at 144-45. Here, the agency provided no such opportunity. Moreover, in *American Trucking* the Court held that the power to correct inadvertent ministerial errors may not be used to "execute a subsequently adopted policy." 358 U.S. at 146. As previously shown, the April 30 amendment reflected a policy decision by the agency which substantially altered the preexisting regulatory framework.

Finally, *American Trucking* is distinquishable on its facts. In that case the record showed that the agency previously considered and affirmatively decided to adopt a policy which, due to clerical error, was not expressed in its final decision. Here, in contrast, petitioners offer no record support and admit that the agency "failed to consider" the implications of the April 30 and April 3 amend-

33. *See* 39 Fed. Reg. 12354 (April 5, 1974) ("The FEO has regulated the prices of these products pursuant to both [the ESA and the EPAA]"). Indeed, the notion that the agency intended to adopt the April 30 amendment in January borders on the frivolous. In January FEO did nothing more than republish and renumber the CLC regulations which had previously been incorporated by reference. *See* 39 Fed. Reg. 1924; 39 Fed. Reg. 744 (1974).

ments in January of 1974. Pet. 16. Surely, an agency may not be permitted to disregard the statutory requirements that objectives be considered and public participation be provided merely because, prior to that time, the agency "had failed to consider" the rule it intends to adopt.

Petitioners have also seriously misstated the holding in the second authority upon which they rely, *California* v. *Simon,* 504 F.2d 430 (TECA), *cert. denied,* 419 U.S. 1021 (1974). Petitioners state that

> "*Simon* specifically held that the January 14 regulation contemplated follow-up clarifying amendments and that a subsequent amendment was part of the same rulemaking proceeding so that the agency did not have to provide new notice and opportunity for comment." Pet. 17n.13.

That statement is manifestly untrue. *Simon* neither involved a rule promulgated without notice and comment nor a follow-up clarifying amendment to the January 14 regulation that was part of that rulemaking. To the contrary, *Simon* concerned a regulation which had been proposed by the CLC on October 25, 1973 and subsequently adopted on February 21, 1974. 38 Fed. Reg. 29618, 39 Fed. Reg. 8996, 504 F. 2d 432, 434. The question presented was whether the January 14, 1974 regulation had *sub silentio* closed the earlier rulemaking and the court held only that it had not. The *Simon* court certainly did not find that the January 14 regulation contemplated follow-up amendments as petitioners assert, since it quoted from that regulation's preamble that "no specific future changes are currently anticipated." 504 F.2d 434.

Finally, even if petitioners' new argument had a basis in the authorities or the facts, the deficiencies in the promulgation of the April 30 amendment still would not be cured.

Having stated that it inadvertently "failed to consider" the nature of the amendment in January 1974 (Pet. 16), the agency cannot simultaneously argue that in January 1974 it determined that such an amendment would implement the EPAA objectives. Moreover, given its admission of an allegedly inadvertent lack of knowledge or publication of such a rule, the agency cannot simultaneously argue that it gave prior notice of the rule in December 1973. The simple fact is that the agency did not give notice or consider the consequences of the amendment in December 1973, January 1974 or April 30, 1974.

We submit that the agency's newly discovered "continued rulemaking" argument has been improperly presented to this Court, is lacking in substantive merit, is contrary to the facts of record and does not warrant review by certiorari.

VI.

Petitioners Have Mischaracterized The Consequences Of The Decision Below

Petitioners argue that review is warranted because the decision below implicates vast sums which refiners may attempt to recover by increasing gasoline prices. Pet. 27-28. Notably, petitioners do not assert that prices will in fact be affected and, as shown below, that result is unlikely.

With respect to the sums themselves, we believe that advocates' zeal has led to significant exaggeration. Neither respondent nor this Court, however, can presently assess the accuracy of petitioners' unsupported estimates, for neither the methodology nor the facts upon which they are based have been divulged. Certainly a petitioner's wholly unsupported and unexplained assertions regarding the

monetary consequences of a decision ought not provide a basis for review.

If such sums were indeed involved, it ill behooves the agency to argue that its action need not achieve the "fairness and mature consideration" assured by APA procedures or that it need not have carefully considered the statutory objectives. Petitioners' estimates, if correct, would merely reinforce the conclusion that the unanimous decision below is correct. Here, of course, the sums involved are not profits, but costs incurred by refiners which, as the uncontroverted record below showed, Mobil was required to absorb under an ill-considered and procedurally defective regulation. Moreover, any decision affecting the petroleum industry as a whole will have potentially substantial economic consequences but surely that fact alone does not mean that any particular case warrants consideration by certiorari. Where, as here, no substantial legal questions are raised and the record compellingly supports the findings of fact of both courts below, certiorari is inappropriate.[34]

Although we are incapable of assessing the accuracy of petitioners' estimates, the impact upon consumers has been substantially distorted by the agency. Whatever the accurate figure may be, there is no realistic prospect that the sums at issue will affect gasoline prices in the near term, if at all. The 29 largest refiners alone already have available "banks" of unrecovered costs of $5 billion which cur-

34. If the petition were granted and the decision below reversed, the economic result for which petitioners urge review would not be accomplished. TECA would then be obliged to determine whether the district court was correct in finding that the April 30 amendment contravened the statutory requirement for a dollar-for-dollar passthrough, a decision respondent submits was compelled by the record of the amendment's impact upon Mobil. Further, both courts below may find the rule lacks a rational basis and contravenes the statutory objectives. *See* discussion *supra* at 16.

rent market conditions prevent from being passed through in actual prices.[35] Effective March 15, 1980, the President imposed a "conservation fee", the net effect of which is to increase the retail price of gasoline by 10 cents a gallon.[36] That increase will further impede refiners' ability to recover banked costs in the marketplace.[37] Indeed, it is passing strange for petitioners to argue that the decision of the court of appeals may weaken the nation's attempt to fight inflation by allowing gasoline price increases when the President has found that such increases are presently in the national interest.

Petitioners' assertions with respect to the impact of the decision below on the agency's enforcement program (Pet. 28.) are equally speculative and unfounded. Their contention is dependent upon the unjustified presumption that the agency will prevail in each of its "hundreds of pending actions." *Id.* To the extent it does not prevail, TECA's decision will have no impact whatsoever on the enforcement program. We submit that there is no reasonable basis for

35. DEPARTMENT OF ENERGY, ECONOMIC REGULATORY ADMINISTRATION, MONTHLY ENERGY REVIEW 81 (Feb. 1980). It is likely that the numerous smaller refiners also have substantial preexisting banked costs, further reducing the possible effect of TECA's decision upon consumers' prices.

36. *See* 345 Energy Users Report (BNA) at 15-17 (March 20, 1980).

37. Petitioners' argument that the possibility that gasoline will be decontrolled in September 1981 provides an incentive for current cost recovery (Pet. 28) is unsound. If, upon decontrol, refiners will be able to fully recover their costs in the marketplace, there is no need or incentive to do so presently. Moreover, given the size of existing banks and the impact of the "conservation fee", it is improbable that refiners will be able to eliminate their banks prior to decontrol.

such a presumption. There is, moreover, no arguable public interest in permitting the agency to allege violations of law founded upon rules which the agency itself has promulgated in arbitrary disregard of both substantive and procedural requirements. Petitioners' overstated speculation respecting the consequences of the decision below ought not provide a basis for the writ requested.

Finally, we believe that petitioners' assertion that TECA's decision will deter agencies from taking prompt action where the "public interest overrides the need for notice and comment" (Pet. 29) simply ignores what the courts below held. Here, there was not even an arguable basis for believing that any "public interest" supported the agency's actions. The public interest was in ensuring that the agency engage in reasoned decisionmaking and provide the minimum essential rights and procedures set out in the APA. The decision below does no more than encourage agencies to provide the fairness and mature consideration required by Congress.

Conclusion

The decision below applied settled law to the particular facts of this case and arrived at a just result. No important issues of law warranting review by this Court are presented by that decision or the new argument raised in the petition. The petition should accordingly be denied.

Respectfully submitted,

April 14, 1980

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No. 79-1365

In the Supreme Court of the United States

OCTOBER TERM, 1979

DEPARTMENT OF ENERGY AND CHARLES W. DUNCAN, JR., SECRETARY OF ENERGY, PETITIONERS

v.

MOBIL OIL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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1. Respondent contends (Br. in Opp. 9) that "[c]ontrary to the impression created by petitioners, the decision below did not strike down the agency's cost-allocation formula." The decision below, respondent suggests (Br. in Opp. 9-10), merely voided an amendment to the cost-allocation formula "but otherwise left the regulatory system and the cost-allo-

cation formula intact." As we correctly stressed in our petition (at page 2), however, the amendment (and its subsequent repromulgations) at issue in this case has been at the core of the petroleum-refiner price-control regulations since they were first promulgated. It is the regulatory provision by which costs have been allocated between covered and decontrolled products since 1974. In light of the escalating costs of crude oil since that time, the allocation of such increased costs between covered products and decontrolled products has been a critical determinant of the maximum allowable price under the regulations. Although respondent questions (Br. in Opp. 28-31) the precise amount of the industry-wide sums at stake, it does not dispute that those sums are vast.

2. We contended in the petition that where an agency issues a rule after notice and comment and then discovers that the rule inadvertently expresses a policy that the agency had not intended to adopt, the agency may issue a conforming amendment without commencing new rulemaking procedures or inviting new comment under 5 U.S.C. 553, at least where the amendment falls within the subject on which comment was originally invited and the amendment is promulgated before anyone places reasonable reliance on the original rule. Respondent's various objections to this contention are insubstantial.

a. Respondent contends (Br. in Opp. 26) that *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), is inapposite because the agency in that case provided notice and a hearing to the interested parties before correcting its final certificate. However, the relevant holding of *American Trucking* for present purposes is that the original ICC proceeding was *not* terminated by the issuance of the final certificate, despite a statutory provision that appeared to make "the issuance of a certificate the final step in the administrative process" (358 U.S. at 146), and that the proceeding continued at least for the purpose of correcting unintended policies expressed inadvertently in the final certificate. It is true that in *American Trucking* the agency gave notice and a hearing prior to making the corrections and that the Court's opinion (*id.* at 144-145) suggests that such corrections must be preceded by those procedural requisites. But the notice and hearing requirements were relevant in that case only because the agency order followed an adjudication. In rulemaking, by contrast, if the agency provides adequate notice at the outset of the proceeding, there is no further procedural requirement for supplemental notice and comment before each interim step in the proceeding.

Indeed, since the petition in this case was filed, the Fifth Circuit has adopted our view of *American Trucking*. In *Chorine Institute, Inc.* v. *OSHA*, 613 F.2d 120 (5th Cir. 1980), the court of appeals sustained the Secretary of Labor's corrective amendment of an occupational health standard without notice and comment, several years after the standard was

originally adopted, in circumstances where the amendment, by inserting a designating code in the standard that had previously been omitted, offered substantially greater health protection. Citing *American Trucking*, the Fifth Circuit held that "[t]he courts have long recognized that administrative agencies may correct inadvertent, ministerial errors" so long as they are not " 'used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.' " 613 F.2d at 123. Although *Chorine Institute* arose (as administrative law cases inevitably will) in a different regulatory setting, it plainly supports our argument that under 5 U.S.C. 553 an agency may correct regulations expressing policies it did not intend to adopt without commencing new rulemaking proceedings.

b. Respondent also contends (Br. in Opp. 27) that the petition "seriously misstated" the holding of *California* v. *Simon*, 504 F.2d 430 (T.E.C.A.), cert. denied, 419 U.S. 1021 (1974), by stating that "*Simon* specifically held that the January 14 regulation contemplated follow-up clarifying amendments and that a subsequent amendment was part of the same rulemaking proceeding so that the agency did not have to provide new notice and opportunity for comment" (see Pet. 17 n.13). Our statement is correct. *Simon* held (504 F.2d at 436-439) that after issuing the January 14 regulations (the very regulations in question here) the agency was entitled on February 21 to reverse—without additional notice and comment—even a deliberate policy choice expressed in the original regulations.

Both promulgations were part of the same rulemaking proceedings. In October 1973 the agency proposed to revoke an exemption for state and local governments. In December 1973 the agency proposed to retain the exemption and did so in the January 14 regulations. On February 21, 1974, the agency reversed that decision and revoked the exemption. *Simon* held that the January 14 regulations did not terminate the rulemaking proceedings with respect to the exemption and noted that the agency expressly stated in the January 14 preamble that "a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise" (504 F.2d at 438). Therefore, said the court, no new notice and comment was required for the February 21 action.

c. Even if the petition correctly stated the governing principle, respondent contends (Br. in Opp. 11) that it is factually inapplicable in this case because the "rule adopted on April 30 was not proposed in December 1973." This ignores the fact that, in order to adopt a rule under the APA, an agency need not adopt the precise rule as originally proposed; the final rule need only be a logical outgrowth of the pro-

posed rule.[1] Here, the December notice proposed to carry forward the Cost of Living Council volumetric cost-apportionment formula. The April 30 amendment did so with only an appropriate modification to cancel the indirect effect on the V-factor denominator caused by its use of the term "covered products" and the slightly narrower scope of that term occasioned by the expiration of the Economic Stabilization Act. Inasmuch as these considerations were publicly known at all relevant times, the April 30 amendment was plainly a logical outgrowth of the December 1973 proposal.

In a related argument, respondent insists (Br. in Opp. 12-13) that the April 3 amendment was not the result of inadvertence, that the first time a policy choice on the matter had to be made was April 3, and that on that date the agency consciously adopted a policy that "no costs are properly attributable to refinery residue." Therefore, respondent concludes (Br. in Opp. 13) that on April 30 the agency consciously made a different "policy decision" to attribute "costs to the decontrolled products on a volumetric basis." Thus, in respondent's view, a new round of notice

[1] See *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied sub nom. *Eli Lilly and Co.* v. *Costle*, No. 79-485 (Feb. 19, 1980); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977); *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 659 (1st Cir. 1974); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

and comment was required prior to the April 30 amendment.

This argument is far fetched for a number of reasons. To begin with, as mentioned above, the policy choice concerning the continuation of the volumetric cost apportionment formula under the EPAA first arose in December 1973, not on April 3, 1974. Second, the April 3 amendment was a conscious policy decision only with respect to removing the decontrolled products from the scope of the regulations. Nothing in that amendment suggests an intent to modify the V-factor of the pricing formula. The whole problem that led to the April 30 amendment was that the April 3 amendment did *not* represent a conscious policy choice concerning the V-factor. The April 30 amendment was nothing more than an accurate expression of the policy the agency meant to continue on January 14.[2]

3. The agency's argument is not inconsistent with its position below. The argument challenges the erroneous premise of respondent's own successful

[2] Indeed, had the April 3 amendment expressly or even impliedly modified the V-factor in the way respondent claims, the modification of the V-factor would have been invalid, under respondent's theory, for lack of notice and opportunity to comment. This would have meant that all end products would have remained in the denominator as required by the January 14 formula (and as the agency intended all along). Conversely, if the formula impliedly adopted in the April 3 amendment is valid without notice and comment, so is the formula adopted on April 30. Although our petition (at page 18 n.13) pointed out this fallacy in respondent's argument, respondent has not answered it.

argument below—that the April 30 amendment was a new rulemaking (and thus that new notice and comment was required).

First, contrary to respondent's contention (Br. in Opp. 24 n.30), the preamble to the April 30 amendment did not state that the amendment was being "enacted *without* prior notice." Instead, it specifically referred to the cost-allocation formula adopted in the January 14 rulemaking, noted the intervening decontrol of the five petroleum products exempted from regulation under the EPAA, and stated that the formula's denominator was being revised to include "all products produced from crude oil" (39 Fed. Reg. 15139 (1974)). Because of the need to "provide immediate guidance and information," the agency determined that "normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days" (*ibid.*). Thus, not only was the public notified of the subject matter of the rulemaking but, in view of the express references to the January rulemaking and the April 3 amendment, the preamble as a whole supports the argument that the April 30 proceeding was a continuation of the earlier rulemaking.

Second, respondent has mischaracterized the agency's answer to the complaint admitting that "the April 30 amendment * * * was enacted without prior notice" (R. 83). Respondent neglects to add that in the same sentence the answer specifically denied the allegation that "neither Mobil nor other interested

parties were afforded an opportunity to comment on the amendment as required by section 4 of the [APA]" (R. 66, 83).

Finally, there is no merit to respondent's claim (Br. in Opp. 24 n.30) that the agency "conceded below that it had not considered all of the statutory objectives." Although it was the agency's position below, as it is here, that in view of their conflicting nature, not all of the statutory objectives were reasonably implicated by the regulations adopted (Br. in Opp. 17; see Pet. 23-24), and that the statutory requirement that the regulation "shall provide for" the statutory objectives "to the maximum extent practicable" is satisfied if the regulations as a whole in fact foster certain of the objectives (Br. in Opp. 18; Pet. 23), at no time did the agency concede that the objectives were not considered in any way. Respondent's discovery in the district court was directed virtually exclusively to whether the agency had considered the impact of the regulation on *unregulated* products, especially petroleum coke. The agency's response indicated that its concern in adopting the April 30 amendment was not for unregulated products but for the prices of regulated products (R. 36, 38-42, 96-97). See also the preamble to the April 30 amendment (39 Fed. Reg. 15139 (1974)). Significantly, the agency argued below that "[w]hen the agency first promulgated the cost-allocation formula following the enactment of the EPAA, the agency considered the relevant factors and concluded that volumetric apportionment best served the regulatory

purposes" (Pet. for Reh. 7). That continues to be the agency's position in this Court. See Pet. 17 n.13.

4. In response to our argument (Pet. 25-27) that subsequent rulemakings cured, at least prospectively, any deficiencies in the April 30 amendment, respondent contends (Br. in Opp. 20-22) that the later rulemakings were "unrelated" and that "petitioners did not and cannot point to any subsequent rulemaking in which the agency considered or allowed public commentary on a proposal relating to the issues involved in the April 30 amendment * * *." This assertion is incorrect. As we mentioned in the petition (at page 10), less than five months after the April 30 amendment, the agency published the "first proposed comprehensive revision" of the refiner price regulations (39 Fed. Reg. 32718 (1974)), in which the agency proposed a number of changes to 10 C.F.R. 212.83.

Specifically, the agency proposed, *inter alia*, to eliminate the "special products" rule (39 Fed. Reg. 32722, 32728 (1974)),[3] to continue the special crude oil cost-allocation rule for propane (*id.* at 32720), to

[3] To accomplish this, the agency proposed to amend the cost-allocation formula so that the numerator of the formula would include the "total volume of all covered products refined * * * from crude petroleum" and the denominator would include the "total volume of all petroleum products refined * * * from crude petroleum including other than covered products" (39 Fed. Reg. 32728 (1974)). Thus, a refiner could allocate all costs attributable to all covered products as a group among covered products as it desired but still would not be allowed to pass through more than this amount in the prices of covered products.

restrict the provisions of 10 C.F.R. 212.83 allowing refiners to carryover, or to "bank," increased product costs not recouped in a current month (39 Fed. Reg. 32723 (1974)), to modify the equal-application rule to permit greater geographic pricing flexibility (*id.* at 32722), and to make clear that the cost of crude oil used in the refinery process as fuel may not be treated as an increased crude oil cost but rather as a nonproduct cost (*id.* at 32724). In addition, the agency stated (*ibid.*):

> The FEA price regulations are complex and interrelated. Many of the specific proposals made herein affect various other aspects of these regulations. The nature and extent of the revisions being proposed in this notice of rulemaking are quite broad. Accordingly, to the extent that parties wish to comment in this proceeding on aspects of the price regulations which have not specifically been addressed in this notice, they are invited to do so.

Moreover, in order to explain the proposed modifications to 10 C.F.R. 212.83 in context, the agency published the entire proposed section, the same provision at issue in this case (39 Fed. Reg. 32727-32729 (1974)). Significantly, respondent filed extensive comments on September 27, 1974—commenting precisely on the very aspect of the V-factor at issue in this case.[4]

[4] Respondent commented in part:

> The proposed regulations allow the pass-through of increased cost of crude petroleum only to the proportion

As a result of the September notice, the agency adopted a number of revisions to 10 C.F.R. 212.83. Most of those revisions were made effective on November 1, 1974. 39 Fed. Reg. 39259 (1974). Additional changes were adopted on November 29, 1974, when the entire section was republished. 39 Fed. Reg. 42368 (1974). Respondent's suggestions notwithstanding, the agency retained the requirement that only increased crude oil costs attributable to regulated products could be recovered in the prices of those products. *Id.* at 42370-42371. Respondent (and the court below) are thus plainly wrong in asserting that any errors in the April 30 rule were not subsequently cured.

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represented by controlled products plus refinery fuel (as a non-product cost). The recovery of increased cost of crude attributable to decontrolled products is disallowed, apparently under the premise that recovery is available for decontrolled products in the free market * * *. Decontrolled products are a mixed bag of premium products (waxes) and low-value by-products (petroleum coke) and decontrol may benefit or penalize an individual refiner depending upon its mix of decontrolled products. To correct this apparent inadvertent potential discrimination, we suggest that the cost pass-through formula contain a provision to include the total of crude oil related pass-through costs to permit the actual recovery on decontrolled products. This could be accomplished within the spirit of these proposed regulations by including decontrolled product volume in the vn definition but then require that decontrolled product prices above the May 15, 1973 price be subtracted (similar to carbon black oil provision) from total allowable pass-through.

For these reasons and the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

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